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ONTARIO LABOUR RELATIONS BOARD REPORTS



July 1994



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

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EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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Related Employer - Construction Industry - Evidence - Practice and Procedure - Remedies - In absence of contrary pleadings or evidence, Board deeming respondents to have accepted certain facts stated in application - Board finding five respondents engaged in related activities and finding common direction and control among four respondents - Board drawing adverse inferences from lack of production and lack of evidence produced by those respondents - Single employer declaration issuing in respect of four respondents - Board distinguishing *Golden Arm Flooring* case in respect of joint and several liability where damages awarded in earlier Board proceeding against one respondent predated relationship between it and other respondents - Application in respect of fifth respondent dismissed

CENTRAL FORMING & CONCRETE INC.; ALTRACON CONSTRUCTION LIMITED; GASPO CONSTRUCTION LIMITED; ASHWORTH ENGINEERING INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, CJA 805

Remedies - Change in Working Conditions - Discharge - Discharge for Union Activity - *Hospital Labour Disputes Arbitration Act* - Interim Relief - Settlement - Unfair Labour Practice - Union certified three years earlier and still without first collective agreement - Union making unfair labour practice complaint in respect of work reorganization ("alternative placement") and lay-offs affecting one-half of the bargaining unit - Union alleging that employer's conduct motivated by anti-union *animus*, breaching statutory freeze and violating minutes of settlement of earlier complaint - Union seeking interim order preserving *status quo* pending disposition of unfair labour practice complaint or until interest arbitration award issued - Employer implementing impugned changes after notice of union's interim relief application, but before Board hearing - Board concluding that balance of harm weighing in favour making interim order - Employer directed to restore and maintain *status quo* with respect to bargaining unit jobs pending disposition of union's complaint

THE MISSISSAUGA HOSPITAL; RE THE PRACTICAL NURSES FEDERATION OF ONTARIO 934

Remedies - Change in Working in Conditions - Discharge - Discharge for Union Activity - Interim Relief - Unfair Labour Practice - Union filing unfair labour practice complaint in respect of employee's discharge and in respect of work reorganization and second employee's demotion alleged to violate statutory freeze - Union seeking interim relief pending determination of complaint - Board declining to order reinstatement of discharged employee but directing employer to continue or restore second employee's terms and conditions of employment on interim basis

OMBUDSMAN ONTARIO; RE OPEIU, LOCAL 343 885

Remedies - Change in Working Conditions - Interim Relief - Unfair Labour Practice - Board directing employer to defer implementation of announced shift/schedule changes pending determination of union's unfair labour practice complaint

MULTIPAK LTD.; RE TORONTO TYPOGRAPHICAL UNION NO. 91-0 884

Remedies - Construction Industry - Evidence - Practice and Procedure - Related Employer - In absence of contrary pleadings or evidence, Board deeming respondents to have accepted certain facts stated in application - Board finding five respondents engaged in related activities and finding common direction and control among four respondents - Board drawing adverse inferences from lack of production and lack of evidence produced by those respondents - Single employer declaration issuing in respect of four respondents - Board distinguishing *Golden Arm Flooring* case in respect of joint and several liability where damages

awarded in earlier Board proceeding against one respondent predated relationship between it and other respondents - Application in respect of fifth respondent dismissed

CENTRAL FORMING & CONCRETE INC.; ALTRACON CONSTRUCTION LIMITED;
GASPO CONSTRUCTION LIMITED; ASHWORTH ENGINEERING INC.; RE
CARPENTERS AND ALLIED WORKERS, LOCAL 27, CJA 805

Remedies - Sale of a Business - CNE and Labourers' union bound to collective agreement covering cleaners working at various buildings at Exhibition Place - CNE leasing one of those buildings to business (Medieval Times) providing dinner and entertainment - Medieval Times using cleaning contractor to perform cleaning services - Board satisfied that criteria in section 64.2 of the Act proved, that "premises" encompassing entirety of Exhibition Place, that CNE had ceased to provide certain cleaning services and that substantially similar services provided by "another employer" - Application allowed - Board declaring that sale of a business deemed to have resulted from CNE to Medieval Times - Board also declaring that Medieval Times bound by notice to bargain delivered by Labourers' union to CNE

MEDIEVAL TIMES DINNER & TOURNAMENT (TORONTO) INC.; RE LIUNA,
LOCAL 506 865

Sale of a Business - Reference - Union representing predecessor hotel's employees alleging sale of a business - Board satisfied that alleged successor purchased certain assets from predecessor, but that ongoing enterprise not transferred - Board finding that predecessor operated hotel business and that alleged successor operating restaurant business and acting as landlord - Board finding no sale of business - Board advising Minister that alleged successor not bound by predecessor's collective agreement with union

SANFORDS ROADHOUSE RESTAURANT; RE THE HOSPITALITY, COMMERCIAL AND SERVICE EMPLOYEES UNION, LOCAL 73 897

Sale of a Business - Remedies - CNE and Labourers' union bound to collective agreement covering cleaners working at various buildings at Exhibition Place - CNE leasing one of those buildings to business (Medieval Times) providing dinner and entertainment - Medieval Times using cleaning contractor to perform cleaning services - Board satisfied that criteria in section 64.2 of the Act proved, that "premises" encompassing entirety of Exhibition Place, that CNE had ceased to provide certain cleaning services and that substantially similar services provided by "another employer" - Application allowed - Board declaring that sale of a business deemed to have resulted from CNE to Medieval Times - Board also declaring that Medieval Times bound by notice to bargain delivered by Labourers' union to CNE

MEDIEVAL TIMES DINNER & TOURNAMENT (TORONTO) INC.; RE LIUNA,
LOCAL 506 865

Settlement - Change in Working Conditions - Discharge - Discharge for Union Activity - *Hospital Labour Disputes Arbitration Act*- Interim Relief - Remedies - Unfair Labour Practice - Union certified three years earlier and still without first collective agreement - Union making unfair labour practice complaint in respect of work reorganization ("alternative placement") and lay-offs affecting one-half of the bargaining unit - Union alleging that employer's conduct motivated by anti-union *animus*, breaching statutory freeze and violating minutes of settlement of earlier complaint - Union seeking interim order preserving *status quo* pending disposition of unfair labour practice complaint or until interest arbitration award issued - Employer implementing impugned changes after notice of union's interim relief application, but before Board hearing - Board concluding that balance of harm weigh-

ing in favour making interim order - Employer directed to restore and maintain *status quo* with respect to bargaining unit jobs pending disposition of union's complaint

THE MISSISSAUGA HOSPITAL; RE THE PRACTICAL NURSES FEDERATION OF ONTARIO 934

Strike - Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike Replacement Workers - Unfair Labour Practice - Wearing of union T-shirts in workplace lawful activity protected by *Act* - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the *Act* by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

MISSISSAUGA HYDRO ELECTRIC COMPANY; RE IBEW, LOCAL 636..... 883

Strike - Picketing - Unfair Labour Practice - Employer seeking order to restrict alleged "unlawful picketing" and give it access to main receiving doors of struck store - Statute directing Board to focus not on lawfulness of picketing, but to balance newly conferred statutory picketing rights with applicant's operations to avoid undue disruption - Board adopting functional approach - Board declining to impose restrictions on picketing and dismissing employer's application under section 11.1 of the *Act* - Board dismissing union's complaint that employer engaged in strike related misconduct contrary to section 73 of the *Act*

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED, THE PARTNERS OF MILLER THOMSON, BARRISTERS AND SOLICITORS, DIRK VAN DE KAMER; RE UFCW, LOCALS 175 AND 633 909

Strike - Ratification and Strike Vote - Unfair Labour Practice - Employee complaining about secrecy of strike vote 8 weeks after the vote and 3 weeks into the strike - Board finding applicant's delay in making application to be significant and without reasonable explanation - Board exercising its discretion against inquiring further into merits of application

MARRIOTT MANAGEMENT SERVICES; RE VICTOR CARQUEZ; RE CUPE AND ITS LOCAL 229 857

Strike Replacement Workers - Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike - Unfair Labour Practice - Wearing of union T-shirts in workplace lawful activity protected by *Act* - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the *Act* by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

MISSISSAUGA HYDRO ELECTRIC COMPANY; RE IBEW, LOCAL 636..... 883

Termination - Bargaining Unit - Union representing employees in separate full-time and part-time bargaining units - In previous round of bargaining, employer and union agreeing to combine the two units together with a third bargaining unit in another municipality upon expiry of collective agreement - Group of employees making timely termination application in respect of full-time and part-time units - Board rejecting union's submission that employees required to demonstrate appropriate level of support in combined bargaining unit - Board directing representation votes in full-time and part-time bargaining units

RETAIL, WHOLESALE CANADA, CANADIAN SERVICE SECTOR, DIVISION OF THE USWA, LOCALS 414, 422, 440, 448, 461, 483, 488, 1000, 1688; RE PRIMROSE G. SHORT..... 891

Termination - Certification - *Crown Employees Collective Bargaining Act* - Rival union seeking to terminate incumbent union's bargaining rights for certain "enforcement officers" employed by Crown agency covered by *Crown Employees Collective Bargaining Act, 1993* (Bill 117) and/or applying to be certified to represent those employees - Parties disputing effect of

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transition provisions in Bill 117 - Board concluding that Labour Relations Board (and not Ontario Public Service Labour Relations Tribunal) having jurisdiction to determine the applications and that provisions of "old" *Crown Employees Collective Bargaining Act* applying to the applications

TORONTO AREA TRANSIT OPERATING AUTHORITY; RE ASSOCIATION OF GO TRANSIT ENFORCEMENT OFFICERS; RE AMALGAMATED TRANSIT UNION, LOCAL 1587

943

Trade Union - Certification - Liquor Boards Employee's Union applying for certification in respect of certain municipal employees - Union's constitution restricting membership to employees of the Crown, its agencies or any private employer - Board concluding that municipal employees not eligible for membership under applicant union's constitution - Union not having established practice of admitting persons to membership without regard to constitution's eligibility requirements - Application dismissed

THE MUNICIPALITY OF METROPOLITAN TORONTO, METROPOLITAN TORONTO CIVIC EMPLOYEES' UNION, LOCAL 43, AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79; RE ONTARIO LIQUOR BOARDS EMPLOYEES' UNION

938

Unfair Labour Practice - Change in Working Conditions - Discharge - Discharge for Union Activity - *Hospital Labour Disputes Arbitration Act*- Interim Relief - Remedies - Settlement - Union certified three years earlier and still without first collective agreement - Union making unfair labour practice complaint in respect of work reorganization ("alternative placement") and lay-offs affecting one-half of the bargaining unit - Union alleging that employer's conduct motivated by anti-union *animus*, breaching statutory freeze and violating minutes of settlement of earlier complaint - Union seeking interim order preserving *status quo* pending disposition of unfair labour practice complaint or until interest arbitration award issued - Employer implementing impugned changes after notice of union's interim relief application, but before Board hearing - Board concluding that balance of harm weighing in favour making interim order - Employer directed to restore and maintain *status quo* with respect to bargaining unit jobs pending disposition of union's complaint

THE MISSISSAUGA HOSPITAL; RE THE PRACTICAL NURSES FEDERATION OF ONTARIO

934

Unfair Labour Practice - Change in Working in Conditions - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Union filing unfair labour practice complaint in respect of employee's discharge and in respect of work reorganization and second employee's demotion alleged to violate statutory freeze - Union seeking interim relief pending determination of complaint - Board declining to order reinstatement of discharged employee but directing employer to continue or restore second employee's terms and conditions of employment on interim basis

OMBUDSMAN ONTARIO; RE OPEIU, LOCAL 343

885

Unfair Labour Practice - Change in Working Conditions - Interim Relief - Remedies - Board directing employer to defer implementation of announced shift/schedule changes pending determination of union's unfair labour practice complaint

MULTIPAK LTD.; RE TORONTO TYPOGRAPHICAL UNION NO. 91-0

884

Unfair Labour Practice - Change in Working Condition - *Hospital Labour Disputes Arbitration Act* - ONA alleging that hospital employer violating statutory freeze by granting non-bargaining unit staff one extra week of vacation entitlement and refusing to extend that benefit to ONA bargaining unit members still without first collective agreement - Board applying

“reasonable expectations” test - Application allowed - Employer directed to grant bargaining unit employees same compensation package granted to non-bargaining unit employees

THE BOARD OF GOVERNORS OF THE BELLEVILLE GENERAL HOSPITAL; RE ONA 904

Unfair Labour Practice - Duty to Bargain in Good Faith - First Contract Arbitration - Interest Arbitration - Practice and Procedure - Employer complaining of bad faith bargaining where union put certain issues to interest arbitrator which had not been pursued in bargaining - Board finding nothing illegal about raising “new” issues or changing position in course of submissions to arbitration - Once arbitration process invoked, it is for arbitrator to decide what terms of first agreement will be - Board concluding that facts pleaded disclosing no violation of the *Act* - Application dismissed

CENTRE JUBILEE CENTRE; RE USWA, GERRY LORANGER, BRIAN SHELL 821

Unfair Labour Practice - Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike - Strike Replacement Workers - Wearing of union T-shirts in workplace lawful activity protected by *Act* - Employer’s refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the *Act* by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

MISSISSAUGA HYDRO ELECTRIC COMPANY; RE IBEW, LOCAL 636..... 883

Unfair Labour Practice - Picketing - Strike - Employer seeking order to restrict alleged “unlawful picketing” and give it access to main receiving doors of struck store - Statute directing Board to focus not on lawfulness of picketing, but to balance newly conferred statutory picketing rights with applicant’s operations to avoid undue disruption - Board adopting functional approach - Board declining to impose restrictions on picketing and dismissing employer’s application under section 11.1 of the *Act* - Board dismissing union’s complaint that employer engaged in strike related misconduct contrary to section 73 of the *Act*

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED, THE PARTNERS OF MILLER THOMSON, BARRISTERS AND SOLICITORS, DIRK VAN DE KAMER; RE UFCW, LOCALS 175 AND 633 909

Unfair Labour Practice - Ratification and Strike Vote - Strike - Employee complaining about secrecy of strike vote 8 weeks after the vote and 3 weeks into the strike - Board finding applicant’s delay in making application to be significant and without reasonable explanation - Board exercising its discretion against inquiring further into merits of application

MARRIOTT MANAGEMENT SERVICES; RE VICTOR CARQUEZ; RE CUPE AND ITS LOCAL 229 857

3666-93-R; 3667-93-G; 3857-93-R Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Central Forming & Concrete Inc.**; Altracon Construction Limited; Gaspo Construction Limited; Ashworth Engineering Inc.; Responding Parties; Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America; United Brotherhood of Carpenters and Joiners of America, Locals 1946 and 785, Applicants v. Gaspo Construction Ltd.; Ashworth Engineering Inc.; Altracon Construction Ltd., Responding Parties; Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Central Forming & Concrete Inc.; Altracon Construction Limited; Gaspo Construction Limited; Pamina Construction Inc., Responding Parties

Construction Industry - Evidence - Practice and Procedure - Related Employer - Remedies - In absence of contrary pleadings or evidence, Board deeming respondents to have accepted certain facts stated in application - Board finding five respondents engaged in related activities and finding common direction and control among four respondents - Board drawing adverse inferences from lack of production and lack of evidence produced by those respondents - Single employer declaration issuing in respect of four respondents - Board distinguishing *Golden Arm Flooring* case in respect of joint and several liability where damages awarded in earlier Board proceeding against one respondent predated relationship between it and other respondents - Application in respect of fifth respondent dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *David McKee*, *John Teffer* and *John Gross* on behalf of the Carpenters and Allied Workers; *Geoffrey Thomas* on behalf of Ashworth Engineering Inc. and Pamina Construction Inc.; *Gabe Spoletini* on behalf of Gaspo Construction Limited; *Paul Lametti* on behalf of Altracon Construction Limited.

DECISION OF THE BOARD; July 18, 1994

1. Board Files 3666-93-R and 3857-93-R are applications under section 64 and subsection 1(4) of the *Labour Relations Act* ("the Act"). In these applications the applicant asserts in the alternative that (a) one or more of the responding parties is a "successor employer" as a "sale" of a "business" within the meaning of section 64 of the Act has taken place by or from one or more of the responding parties to another of the responding parties; and/or (b) that the responding parties carry on associated or related businesses or activities under common control or direction and therefore for purposes of the Act constitute one common employer. Board File 3667-93-G is a referral of a grievance pursuant to section 126 of the Act.

2. For ease of reference the applicant in each of these applications will be referred to as "the Carpenters" or "the union". The responding parties will be referred to as "Central Forming", "Altracon", "Gaspo", "Ashworth", and "Pamina".

Procedural Matters

3. These matters first came on for hearing before this panel of the Board on Monday, May 30, 1994. At that time none of the responding parties was represented by legal counsel as each had chosen to act on its own behalf. The appearances referred to above reflect the persons who

appeared on behalf of the various corporate entities on that day. As the responding parties were not represented by counsel the Board advised each at the commencement of the hearing that there is no requirement that parties appearing before the Board retain legal counsel. The Board often conducts hearings where one or more parties are not represented by legal counsel. The Board advised the responding parties however that hearings before it were legal proceedings. The Board's function was to adjudicate upon the issues in dispute. The Board therefore could not act as an advocate for, or advisor to, any party merely because that party was not represented by counsel. Such conduct would be inconsistent with the Board's role as a neutral adjudicator. As a result, the Board advised all of the responding parties that each must bear the responsibility for the presentation of its case and must bear any risks associated with the decision not to retain counsel and act on their own behalf. The Board did note the procedure typically followed and indicated that if any of the responding parties had any questions with respect to the procedures before the Board we would attempt to answer such questions within the confines of our adjudicative role.

4. The hearing proceeded on May 30, 1994. At that time the Board dealt principally with requests by the various parties concerning the production of documents. In that regard the Board rendered an oral ruling which was subsequently reduced to a written decision of the Board dated June 1, 1994.

5. The hearing resumed on June 8, 1994. We note that on that day Mr. Geoffrey Thomas was not in attendance. Mr. Thomas had been the representative for Ashworth and Pamina. On the first day of hearing (Monday May 30th, 1994) Mr. Thomas had left the hearing part way through as he had urgent business matters to attend to (a monthly draw meeting at 2:00 p.m.). In so doing however he indicated that he had instructed and authorized Mr. Spoletini (the representative for Central Forming and Gaspo) to continue to act as his agent and as a representative for Ashworth and Pamina. The hearing continued on that basis. On June 8, 1994 Mr. Spoletini stated that he was authorized to continue in that representative capacity and that Mr. Thomas would not be in attendance that day.

6. On June 8, 1994 counsel for the union sought to put two matters before the Board. One concerned his request that Altracon Construction Company Inc. ("ACCI"), another corporate entity, be added to these proceedings. In the alternative counsel sought to consolidate with these proceedings a fresh application under section 64 and subsection 1(4) of the Act in which that corporate entity was named as a responding party. The second matter which counsel for the Carpenters sought to raise concerned his assertion that the responding parties had not complied with the order for production made by the Board on May 30, 1994. In the circumstances detailed herein the Board did not on that day deal with the first motion, namely the matter pertaining to the addition of ACCI to these proceedings. Instead, the Board first dealt with the issues surrounding the non-production of documents.

7. The Board heard the submissions of all of the parties with respect to the non-production of documents and the asserted failure by the responding parties Ashworth, Pamina, and Gaspo to comply with the Board's order to produce. After hearing those submissions, on the morning of June 8, 1994, the Board rendered the following oral ruling:

We have considered the submissions of each of the parties with respect to the motion made by counsel for the applicant that the Board first deal with the failure of one or more of the responding parties to comply with the Board's order and direction to produce certain documents. That order and direction was rendered orally by the Board on the first day of hearing in this matter, namely May 30, 1994. That oral ruling was reduced to writing in a decision of the Board dated June 1, 1994. We note that the decision of the Board substantially reflected the agreement that the parties made on the first day of hearing concerning the production of documents. We also ordered the production of certain other documents which production had been opposed by

either the applicant or one or more of the responding parties. The documents were ordered to be produced on Monday June 6th, at 10:00 a.m. at the Board's offices, 400 University Avenue, 6th Floor for review by all parties.

It is apparent both from the submissions of the parties and a review of the documents presented by both Mr. Spoletini and Mr. McKee that our order and direction has *not* been complied with. For example, some documents have not been produced at all. In other instances incomplete copies of documents were produced.

The responding parties have put forth various reasons why these documents were not produced either at all or in their entirety. For example, some of the documents such as the records of employment and timesheets of employees on the St. Margarets of the Pines project, Scarborough, are apparently in the possession of an accountant for use in the performance of the accountant's duties. Some documents were produced only in part while other parts were omitted because the responding parties (Gaspo and Ashworth) assert that these other parts were simply not relevant consisting as they do for example of pre-printed pages of standard documents, specifications or sub-contracts with respect to work that is clearly not carpentry work such as mechanical work etc. In addition, Ashworth takes the position that documents with respect to certain of these projects are not relevant insofar as the projects involve residential construction (for example the Yellow Brick House project). It is the position of Gaspo, Central Forming, Ashworth and Pamina that whatever bargaining rights the carpenters' union may have with respect to one or more of these corporate entities apply only to construction activities within the industrial, commercial and institutional sector ("ICI sector") of the construction industry and do not extend to the residential sector. The Carpenters' dispute that these projects do not involve ICI sector construction and therefore assert that if the construction involves arguably ICI projects the documents are arguably relevant. The carpenters assert that in any event the documents were ordered to be produced, have not been produced and it is not open to the responding parties in the face of the Board's orders to decide to produce only part of the documents ordered produced and not to produce others which they view as irrelevant.

The proceedings before us consist of two applications pursuant to subsection 1(4) and section 64 of the *Labour Relations Act*, and one referral of a grievance pursuant to section 126 of the Act.

With respect to the section 126 referral of a grievance we note that where a party fails to comply with the Board's orders in such an arbitration proceeding, the Board as arbitrator has the power to fine or commit to prison the recalcitrant party. With respect to the subsection 1(4) and section 64 applications where a party fails to comply with the Board's orders and directions, the Board, pursuant to section 13 of the *Statutory Powers Procedure Act* may either on its own motion or that of any party to the proceedings state a case to the Divisional Court that the recalcitrant party be found guilty of contempt. In this regard see for example, *Rino Zanette (1981) Ltd.*, [1986] OLRB Rep. Nov. 1572 and the various cases referred to therein.

We do not consider it necessary at this stage of these proceedings to consider either of these options until we have heard and considered the further submissions of the parties that these matters can be disposed of on the basis of the pleadings filed and the documents which have been produced. In particular we note again that the *Labour Relations Act* imposes a statutory duty upon the responding parties to adduce all facts within their knowledge that are material to the applications under subsection 1(4) and section 64 of the Act. In these circumstances a failure by any of the responding parties to adduce that material and to comply with the order of production made by the Board on May 30, 1994 *may* result in adverse inferences being drawn by the Board that the facts or documents not produced support the applicant's case in much the same way as an adjudicator may draw adverse inferences where available evidence is not tendered.

The Board is prepared to proceed to deal with any submissions that any of the parties may wish to make in that regard at 2:00 p.m.

8. After the Board rendered that oral ruling it recessed for lunch for one hour and forty-five minutes to enable the parties to consider their positions. Upon our return counsel for the Carpenters made a motion to the Board that it deal with the matters before it on the basis of the mate-

rial before the Board. With the exception of the addition of certain assertions made by Mr. Spoletini during the course of his submissions (which assertions counsel for the Carpenters agreed could be considered as additional facts pleaded by the responding parties) both Mr. Lametti on behalf of Altracon, and Mr. Spoletini on behalf of the other responding parties also agreed that the Board could dispose of these matters on the basis of the material then before the Board. The responding parties did not seek to adduce further evidence before the Board.

9. The submissions of each of the parties differed as to how the Board should dispose of these matters. On the basis of the material before the Board counsel for the union submitted that the applications under section 64 and subsection 1(4) of the Act and the relief claimed in those applications should be granted, while the referral of the grievance should be deferred to further hearing as there was insufficient evidence before the Board to decide that matter. On the other hand Mr. Lametti on behalf of Altracon, and Mr. Spoletini on behalf of the other responding parties each asserted that all of these matters should be dismissed as there was not sufficient evidence before the Board to support *any* of the applications.

Submissions of the Parties

10. We turn then to examine the pleadings and evidence and material before the Board and the submissions of the parties. We do so in the context of particular provisions of the Act and the Board's Rules of Procedure.

11. Subsections 1(5) and 64(13) of the Act respectively place a statutory burden upon responding parties to a "common employer" application and a "successor employer" application to adduce evidence. Subsection 1(5) states:

1.- (5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, *the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.*

Section 64(13) states:

64. (13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, *the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.*

In addition, we note that sections 14 and 19 of the Board's Rules of Procedure provide:

14. Any response filed with the Board must include the following details:

- (a) the full name, address, telephone number and facsimile number (if any) of the responding party, of a contact person for the responding party and of any other person who may be affected by the application;
- (b) *a statement of agreement or disagreement with each fact or allegation in the application;*
- (c) a statement of the responding party's position with respect to the orders or remedies requested by the other parties;
- (d) *where the responding party relies on a version of the facts different from the applicant's, a detailed statement of all material facts on which the responding party relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.*

19. If a party receiving notice of an application does not file a response in the way required by these Rules, *he or she may be deemed to have accepted all of the facts stated in the application, and the Board may decide the case upon the material before it without further notice.*

[emphasis added]

12. We have before us the pleadings of the parties, the *viva voce* testimony of Mr. Lametti, such documents as were produced pursuant to our order of May 30, 1994, (including but not limited to a lease agreement between Gaspo and Ashworth and agreements to provide services between Ashworth and Geoffrey Howard Thomas and Ashworth and Gaspo), certain material filed with the Ministry of Consumer and Commercial Relations pursuant to the *Corporations Information Act* and the *Business Corporations Act*, a shareholders agreement dated May 15, 1987 amongst, *inter alia*, Mr. Lametti, Mr. Thomas, Spyder Holdings Limited and Briscan Developments Inc., agreements between the carpenters' union and Altracon, and decisions of the Board involving Gaspo.

13. In addition to this material we have also considered the submissions of the parties and, to the extent noted herein, have drawn some adverse inferences from the failure of some or all of the responding parties to produce the documents directed to be produced or otherwise adduce evidence as required by the statute.

Pamina and Ashworth

14. Neither Pamina nor Ashworth filed any response. In the result each may be deemed to have accepted all of the facts stated in the applications. (See section 19 of the Rules). This is particularly appropriate where the statute itself imposes a duty to adduce at the hearing all facts within their knowledge that are material to the allegations made in the applications. (Subsection 1(5) and section 64(13)).

15. Moreover, the material before us supports a declaration that Pamina and Ashworth carry on associated or related activities or businesses under common control or direction.

16. Pamina was incorporated December 23, 1991. The filings made under the *Corporations Information Act* indicate that its head office address is 2131 Williams Parkway, Unit 17, Brampton, the same address which Gaspo leases to Ashworth. Gina Spoletini, (it is not disputed that she is the spouse of Mr. Spoletini) was one of its first directors upon incorporation. Its most recent filings with the Ministry of Consumer and Commercial Relations indicate that Geoffrey H. Thomas is a director of Pamina having been first elected on November 20, 1992. The same Geoffrey H. Thomas is also the first and only director of Ashworth a corporation incorporated on September 17, 1992. In the absence of any contrary pleading or evidence, these facts are sufficient to establish common control or direction.

17. In addition, in the absence of any contrary pleading or evidence we have deemed both Pamina and Ashworth to have accepted those facts stated in the application which support the finding that each corporate entity carries on business in the construction industry. Pamina has recently commenced a construction project at St. Margarets of the Pines, Scarborough as a general contractor. Ashworth has been engaged as a general contractor at various construction projects at Park Street Collegiate in Orillia, the University of Western Ontario in London, Canadian Forces Base Borden, and the Ambulance Station, Shelbourne, Ontario.

Gaspo and Central Forming

18. Gaspo and Central Forming filed responses with the Board. The responses were filed in

February 1994 by counsel then acting for these responding parties. By letter to the Board dated March 16, 1994 that counsel advised that he no longer acted for Gaspo or Central Forming.

19. During the course of the hearing Mr. Spoletini indicated to the Board that the responses filed were not accurate and/or did not reflect his instructions to counsel. He noted that as a result this counsel had been reported by him to the Law Society of Upper Canada. At various times during the hearing Mr. Spoletini emphasized that he did not agree with or adopt the responses and requested the Board to take into account the fact that he had made a complaint to the Law Society of Upper Canada with respect to his representation by counsel.

20. The pleadings filed, the documents and evidence produced by the various parties and the submissions of the parties however remain the *only* material before this Board upon which we can determine this matter. In particular, Mr. Spoletini did not seek to put further or other material or evidence before the Board. With the exception of factual statements made by him during the course of his submissions (which statements we have accepted as his evidence and/or pleadings in these matters) there is nothing before us which is inconsistent with the responses filed on behalf of Gaspo and Central Forming. Although counsel ceased to act in or about March 16, 1994, neither Central Forming nor Gaspo filed new or amended responses. Neither retained new counsel to act on their behalf. At no time during the course of the hearing did Mr. Spoletini specify in what respect the responses filed were inaccurate or incomplete. Evidence to support or otherwise confirm Mr. Spoletini's assertions with respect to the purported inaccuracy or incompleteness of the responses was simply not tendered.

21. In the result, on the basis of the material and evidence before us we find the following.

22. Central Forming is an Ontario Corporation which carried on business throughout the 1980's. On August 30th, 1983 it entered into a voluntary recognition agreement binding it to the Carpenters' Provincial Collective Agreement as between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (the "carpenters' provincial collective agreement").

23. Gaspo became active at around the same time that Central Forming ceased to do business. Both Gaspo and Central Forming are controlled by Gabriel Spoletini. The most recent filings under the *Corporations Information Act* list *Ginevra* Spoletini as an officer and director of Gaspo, having held those positions since June 25, 1991. Ms. Spoletini's address is the same address as that of *Gina* Spoletini, a Director of Pamina.

24. On July 23, 1992 Gaspo and Central Forming agreed that they were related employers within the meaning of subsection 1(4) of the Act and executed a voluntary recognition agreement.

25. On February 19, 1993 the Ontario Labour Relations Board found Gaspo to be in violation of the carpenters' provincial collective agreement and assessed damages in the amount of \$2,200.00 and ordered that amount to be paid together with an amount of \$286.51 to Manion Wilkins with respect to benefits owing to a named employee. On May 12, 1993 the Board found Gaspo to be in violation of the carpenters' provincial collective agreement and assessed damages of \$10,719.66.

26. On April 30, 1993 Gaspo filed with the trustees of the benefit plans referred to in the carpenters' provincial collective agreement a "dormant" report indicating that it had ceased to employ members of the Carpenters' union pursuant to the provisions of the carpenters' provincial collective agreement.

27. By a commercial lease dated December 1, 1992 Ashworth agreed to lease from Gaspo the upper floor of 2131 Williams Parkway, Brampton. That lease was for a term of six months with a three year option. That address is also the business address of Gaspo. The terms of the lease specify that Ashworth will use the leased premises only for the business of "general constructing".

28. Two separate but virtually identical agreements were produced by Gaspo and Ashworth. Each is dated April 1, 1993. The first agreement is between Ashworth and Geoffrey Howard Thomas and contains the following terms:

WHEREAS ASHWORTH is a company carrying on the business of Engineering and General Contracting, in the Province of Ontario.

AND WHEREAS ASHWORTH wishes to employ the consulting services of GEOFF in order to manage and supervise the day to day operations of ASHWORTH.

AND WHEREAS GEOFF represents that he is possessed of the necessary experience and knowledge required to manage, supervise and give consultation to ASHWORTH.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of other good and valuable consideration and the sum of TWO (\$2.00) Dollars (receipt and sufficiency whereof is hereby acknowledged), the parties hereto hereby covenant and agree to and with each other as follows:

1. That the foregoing recitals are true in substance and in fact.

2. GEOFF has agreed to manage, consult, supervise and supply any and all services of a managerial, consulting and supervisory nature in connection therewith.

3. The period of employment shall commence on April 1st, 1993 and shall cease one (1) year thereafter, [sic] namely, March 31st, 1994.

During his period of employment, shall diligently exert himself in the performance of the duties and functions as are usually required by and incidental. [sic]

4. In consideration of the services so rendered by GEOFF during the period of employment, ASHWORTH agrees to pay GEOFF a fee of Two thousand -----(\$ 2,000.00) DOLLARS per month, the first of such monthly payments to commence on May 1st, 1993.

....

The agreement contains a one year renewal clause.

29. The second agreement is between Ashworth and Gaspo. It is *identical* in all respects to the agreement between Ashworth and Thomas (even to the point of the incomplete recitation of the duties and functions to be performed in paragraph 3) substituting only the name "Gaspo" where the name "Geoff" appears and specifying a payment of \$7,500.00 from Ashworth to Gaspo for the services rendered (as opposed to the \$2,000.00 payment from Ashworth to Geoff Thomas).

30. Although not produced as directed, we accept Mr. Spoletini's statements that the bank records of Ashworth would disclose that the monthly payments required to be made by these agreements and the lease have in fact been made.

31. Mr. Spoletini stated that he had no relationship to Gaspo, Central Forming or Ashworth other than the relationship reflected in the documents produced. He stated that he was no more than an employee of Ashworth, and held the position of project manager with that corporate entity. From the description of his job it is apparent that Mr. Spoletini performs the duties which one would typically expect a project manager to perform including the overseeing and co-ordina-

tion of Ashworth's construction activities and the activities of those sub-contractors engaged by Ashworth. It is also not in dispute that since in or about April 1993 Gaspo has not bid on any construction work.

Altracon

32. This then leaves us to explore the relationship, if any, between Altracon and any of the other corporate responding parties. In this regard we note again that ACCI is not a responding party to these proceedings as the Board did not deal with the applicant's motion to add ACCI as a party, or its motion to consolidate the application with respect to ACCI to these proceedings.

33. It is not disputed that Altracon is bound to the carpenters' provincial collective agreement. Filed with the Board were settlement documents entered into between the Carpenters and Altracon in which Altracon agrees that it is bound to the carpenters' provincial collective agreement.

34. Altracon was incorporated August 2, 1985 (we note parenthetically that ACCI was incorporated approximately four years later). Filings with the Ministry of Consumer and Commercial Relations indicate that Altracon's officers and directors are Gianpaolo (Paul) Lametti and Geoffrey H. Thomas. Mr. Lametti and Mr. Thomas, together with two other corporate entities namely "Briscan Developments Inc." (owned and controlled by Mr. Lametti) and "Spyder Holdings Limited" (owned and controlled by Mr. Thomas) entered into a shareholders agreement dated May 15, 1987 with respect to the shares of Altracon. Pursuant to that shareholders' agreement Mr. Lametti together with Briscan and Mr. Thomas together with Spyder each own fifty per cent of the shares of Altracon.

35. Finally, it was not disputed by the applicant trade union that the businesses of the various corporate responding parties were not identical. Although each of the responding parties did, or continues to, carry on business in the construction industry, the nature, extent and scope of their work within this industry is somewhat different. When in business Central Forming was a forming and concrete sub-contractor. Gaspo is or was a concrete sub-contractor. Ashworth and Pamina act as general contractors in the open market and, on a competitive bid basis, have engaged in a number of large projects. Altracon is a smaller general contractor operating primarily on an invited tender basis. In this latter regard Mr. Lametti stated that Altracon does not compete with Ashworth and would not get the work even if it did attempt to compete with Ashworth on the open market because of the relative size and expertise of the two companies.

Applicant's Submissions

36. Within this framework counsel for the union argued that the necessary preconditions to granting the applications under section 64 and subsection 1(4) have been established. Counsel submitted that in the absence of any pleadings from Ashworth or Pamina the Board should deem that those two parties have accepted all of the facts stated in the applications. With respect to the other responding parties, counsel asserted that there was common direction and control between Ashworth and Altracon in the form of Mr. Thomas, an officer, director and shareholder of both. He submitted also that the agreements and arrangements between Gaspo (and its owner Mr. Spoletini) and Ashworth indicate that Gaspo and Ashworth essentially entered into a partnership agreement whereby Gaspo had an eighty per cent interest and Mr. Thomas had a twenty per cent interest in Ashworth. In the absence of any other evidence or the production of the bank records and cancelled cheques of Ashworth as ordered by the Board, counsel asserted that it was reasonable to conclude that either:

- a) All of the money flowing into Ashworth was paid out to Gaspo and Geoff Thomas in accordance with the agreements each had with Ashworth (thereby evidencing the eighty per cent - twenty per cent partnership); or
- b) The records if produced would not support the assertions of the respective parties that there were no other dealings or relationships between Ashworth and the other responding parties and in particular between Ashworth and Gaspo and/or Mr. Spoletini.

37. Counsel noted that since Mr. Spoletini became involved with Ashworth in April 1993 (Ashworth having been incorporated in September 1992) Gaspo has ceased to operate in the construction industry while Ashworth has undertaken a number of construction projects commencing in or about March 1993. It was his assertion that in fact the unionized contractor Gaspo had merely folded its business activity into the business of the non-unionized contractor Ashworth. Ashworth was merely a device used by both Mr. Thomas and Gaspo to avoid the contractual relations to which each was bound with the carpenters' union (Mr. Thomas being bound to recognize the Carpenters' as a result of his involvement with Altracon, another unionized contractor). Moreover, although the main business of each of the responding parties differed, the business and activities of each overlapped in part. The fact that they overlapped only in part and not in total was not sufficient to deny the applications under section 64 and subsection 1(4) of the Act (see for example *Warren Steeplejacks Limited*, [1989] OLRB Rep. Mar. 309, *Stebill Limited*, [1989] OLRB Rep. Apr. 384).

38. As relief counsel requested that the Board declare that the responding parties constitute a single or common employer for purposes of the Act, that each is bound to the carpenters' provincial collective agreement, and that each was jointly and severally liable for the payment of damages awarded to the union by reason of Gaspo's violations of that agreement as reflected in the Board's decisions of February 19, 1993 and May 12, 1993. (see *Lakeridge Acoustics*, [1993] OLRB Rep. Feb. 137, *Golden Arm Flooring Inc.*, [1992] OLRB Rep. June 731). In this latter regard counsel for the carpenters indicated that the trade union did not seek to have Altracon held jointly and severally liable for the past damages incurred by Gaspo. Rather the union sought to bind Altracon only for any damages arising as a result of ongoing grievances and only insofar as Mr. Thomas continued to retain an interest in Altracon. Counsel submitted that the financial consequences to Altracon flowing from the common employer declaration should be limited to the extent and proportion of Mr. Thomas' continued interest and involvement with Altracon.

39. Counsel for the union requested that the referral of the grievances in Board File 3667-93-G be deferred as there was insufficient evidence before the Board in respect of that matter.

Submissions of the Responding Parties

40. For their part each of the responding parties requested that all of these matters be dismissed as there was insufficient evidence to support either the declarations sought in the section 64 and subsection 1(4) applications, or the referral of the grievances under section 126 of the Act.

41. On behalf of Altracon Mr. Lametti argued that there was no evidence of common direction or control between Altracon and the other responding parties. Mr. Thomas no longer had an interest in, or direction of Altracon and was precluded by the terms of the shareholders' agreement from binding Altracon to any arrangements without the consent of Mr. Lametti (which consent Mr. Lametti had not given). Moreover, Ashworth and Altracon did not carry on associated or related activities but rather operated in two separate fields of the construction industry.

42. Mr. Spoletini on behalf of the other responding parties concurred that there was no evidence to support granting the declarations sought by the trade union. He submitted that the union had gone on a "fishing expedition" but had been unsuccessful in turning up any evidence to support either a finding of common direction or control or a violation of any agreement to which Gaspo or any of the other responding parties was bound.

43. Mr. Spoletini argued that there was no evidence to suggest Mr. Thomas had any interest or involvement with Gaspo. As to Mr. Thomas' interest in or involvement with Altracon, the evidence indicated that Altracon was in fact a company owned by two other companies namely Briscan Development Inc. and Spyder Holding Limited.

44. Mr. Spoletini submitted that adverse inferences could not and should not be drawn from either the lack of pleadings by Ashworth or Pamina, or a failure to produce the documents ordered to be produced by the Board on May 30, 1994. Mr. Spoletini reiterated his position that the responding parties had produced all the documents in their possession with the exception of the documents relating to the two projects which he asserted were residential and therefore were not relevant. He indicated that he was prepared to produce those documents but before doing so wanted a clear ruling from the Board that the documents were relevant and that he was obliged to produce them. With respect to any other documents which were not produced, Mr. Spoletini indicated that these documents were not in the possession of the responding parties and therefore could not be produced on June 6th as directed. Mr. Spoletini further indicated that the production of those documents could probably be completed in August or September. In the result it was asserted that to the extent possible the responding parties had complied with the Board's order and therefore adverse inferences should not be drawn.

45. We have determined not to accept the submissions of the responding parties that adverse inferences should not be drawn from the failure to file a response to the applications, the failure to produce documents as ordered or to otherwise tender evidence before the Board. In particular, with respect to the failure to produce documents we note that on May 30, 1994 Mr. Spoletini had also argued that documents with respect to a project which he stated was a residential construction project should not be ordered to be produced. At that time the Board indicated its decision to Mr. Spoletini with respect to that issue and directed the production of those documents and specifically indicated to him that the documents pertaining to the Yellow Brick House were included in our order for production. As to the assertion that documents were not in the possession of the responding parties and therefore could not be produced until August or September, the Board notes that the June 6, 1994 date was *agreed upon* by the parties at the hearing of May 30, 1994. At that time there was no suggestion by any of the responding parties that these documents were either not readily available or were in the possession of third parties. In these circumstances the Board concluded that there were no valid reasons why the documents were not produced, and no legitimate circumstances which would warrant delaying these proceedings for a further three or four months rather than proceeding on the scheduled hearing dates of June 8 and June 10 (which hearing dates had been agreed upon by the parties in February 1994, with the notice of hearing being sent March 21, 1994).

46. On the issue of common direction or control Mr. Spoletini asserted that he owned Gaspo and that Mr. Thomas had no ownership or involvement with either Gaspo or Central Forming. Mr. Thomas had an interest in Ashworth but neither Mr. Spoletini, Gaspo nor Central Forming had any interest, ownership or direction or control of that corporate entity. Mr. Spoletini argued that the union had not put forth any evidence to support its contention that Ashworth was a device used by Mr. Thomas and Gaspo to circumvent or avoid the trade union, or to support counsel for the trade union's assertion of an 80 per cent - 20 per cent partnership. Instead, the docu-

ments tendered indicated that Gaspo had merely entered into certain commercial transactions (a lease and an agreement to provide services) with Ashworth in the same way as Mr. Thomas had entered into an agreement with Ashworth for the provision of services. Any relationship between and amongst Gaspo, Ashworth, Mr. Spoletini, Mr. Thomas or any of the other responding parties was limited to those outlined in these various commercial transactions and contractual documents. Mr. Spoletini further submitted that as project manager for Ashworth he had limited involvement in the affairs of Ashworth, and that control and direction of that corporate entity (i.e. which jobs to bid, the bonding arrangements etc.) rested with Mr. Thomas.

47. On the issue of any associated or related activities carried on by these responding parties Mr. Spoletini noted that the nature of the business of each of these responding parties was different. In addition he noted that there was no evidence to suggest that any of the other corporate entities could prevent Gaspo from reactivating its construction activities.

48. Finally, it was asserted by Mr. Spoletini that there was not a shred of evidence to support the grievances filed by the trade union. Nothing before the Board suggested that there had been any violation of any collective agreement to which any of the responding parties may be bound. The responding parties therefore requested that all of these applications be dismissed.

Decision

49. We start with a brief synopsis of the purpose, intent and effect of section 64 and subsection 1(4) of the Act pursuant to which the applications in Board Files 3666-93-R and 3857-93-R have been filed.

50. In *KNK Limited*, [1991] OLRB Rep. Feb. 209, an application under subsection 1(4) of the Act, the Board wrote:

29. Section 1(4) of the Act was enacted in 1971. It deals with situations where the commercial activities which generate employment relationships regulated by the Act, may be carried on through more than one legal entity. Where those legal entities are engaged in related economic activities under common control or direction, the Board is empowered to “pierce the corporate veil” and declare them to be one employer for the purposes of the Act.

30. Section 1(4) clearly and specifically modifies both the common-law notion of “privity of contract” and commercial law assumptions based upon the separate legal identity of the corporate shell. As a result of section 1(4), collective agreement rights need not be co-extensive with the legal framework of the business. To this extent, labour law insulates collective bargaining from disruption should the exigencies of the market prompt an employer to change the number or form of the legal vehicles through which it carries on business. As a result of a 1975 amendment, section 1(4) no longer requires that related business activities be carried on simultaneously. The Legislature has recognized that the identity of the business (as opposed to its legal envelope) may be preserved even though the legal vehicles through which it is carried out may change from time to time.

31. A classic example of the “mischief” to which section 1(4) is directed can be illustrated by *Napev Construction Ltd.*, [1976] OLRB Rep. March 109 (application for judicial review dismissed by the Divisional Court on May 24, 1977, unreported). In that case, Napev was bound by a collective agreement with the Carpenters’ Union which, for reasons which need not be explored here, Napev found too restrictive. To avoid these contractual obligations, the principals of Napev created a new and allegedly independent company named “Vepan”, which then entered into less onerous commercial and collective bargaining relationships. When challenged, Vepan claimed that it was a different legal entity than Napev and that, by virtue of the common-law principle of “privity of contract” it was not bound by any of the obligations previously undertaken by Napev. It was clear to the Board, however, that Vepan was not a truly independent business. It was merely a device to avoid the restrictions of the Carpenters’ collective

agreement and permit more economic flexibility. The Board declared that Napev and Vepan were one employer for the purposes of the Act, and an application for judicial review was dismissed.

32. We do not suggest that *Napev* is necessarily representative of the dozens of cases which the Board has considered over the years, nor in our view is it necessary to undertake an exhaustive review of those cases. We mention *Napev* only because it illustrates a recurring problem in the construction industry to which section 1(4) was specifically directed: companies with established contractual relationships may find it advantageous to “spin off” related but purportedly independent companies, which then carry on business either “non-union” or with more congenial collective bargaining partners.

33. It is important to note that section 1(4) is not an unfair labour practice provision. Although some commercial dealings which trigger section 1(4) may constitute an unfair labour practice, section 1(4) itself does not require a finding of “anti-union animus”. It is not limited to commercial “schemes” designed to escape from the union. It can also apply to *bona fide* business transactions which only incidentally frustrate established statutory rights. Section 1(4) is not a “penalty” provision. It merely allows the Board to consider such business transactions from a labour relations perspective rather than common or commercial law rules.

51. The Board then went on to refer to another case, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, a case in which “a key principal behind one firm ceased to carry on an active business, then shortly thereafter, became the key principal behind a newly-formed company carrying on essentially the same business.” We also find it useful to refer to portions of that decision:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure: nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [64] which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section [64] has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section [64]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeable, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of businesses between related business without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial

reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [64] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present: and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneously economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

52. Given that this application involves activities within the construction industry we find it also useful to refer to the following comments in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses"). It is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine*, *Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al*, CLLC 14.270), and it is one with which we respectively agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills. ...

53. The principles and legislative objectives underlying subsection 1(4) have been identified by the Board in numerous cases and can be conveniently summarized as follows:

Subsection 1(4) is designed:

- (a) to prevent or protect from artificial erosion the bargaining rights of the union,
- (b) to create or preserve viable bargaining structures, and
- (c) to ensure direct dealings between a bargaining agent and the entity with real economic power over the employees.

(See for example *Industrial Mines Installations Limited*, [1972] OLRB Rep. Dec. 1029, *Acto Building (Eastern) Limited*, [1979] OLRB Rep. June 465, *Elmont Construction Limited*, [1974] OLRB Rep. June 341, *Dominion Stores Limited and Min-A-Mart Limited*, [1978] OLRB Rep. Nov. 1013, *Harold R. Stark Limited*, [1978] OLRB Rep. Oct. 945, *West York Construction Limited and Bow Canada Limited*, [1978] OLRB Rep. Sept. 879, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214). The Board's authority to grant a common employer declaration is discretionary. Notwithstanding the presence of the statutory preconditions, the Board need not make a declaration under sub-section 1(4).

54. In *Penny Lane Food Markets Limited*, [1993] OLRB Rep. Mar. 230, a case dealing with an application filed pursuant to section 64 of the Act, the Board made similar observations to those expressed in *KNK, supra*, while examining the purpose and rationale of the "successor employer" or "sale of a business" provisions of the Act.

31. Section 64, both as it was prior to January 1, 1993 and now, is remedial legislation designed to prevent the intentional or incidental frustration or erosion of established bargaining rights as a result of changes in the structure or ownership of a business or part of a business. It operates to attach bargaining rights to a business activity. Like section 1(4) of the Act, an analogous provision, section 64 recognizes that, for labour relations purposes, a "business" is a concept which does not lend itself to precise definition. For purposes of the *Labour Relations Act*, a "business" is an economic activity, whether for profit or not, which can be conducted through a variety of legal vehicles or arrangements. It is this activity, not its form or who owns it, which gives rise to employer-employee-trade union relationships which are regulated by the Act and to which bargaining rights attach. Consequently, bargaining rights, once established, attach to the activity, as the employer, rather than to a particular name, form or owner, and so long as that activity continues the bargaining rights continue to exist. Common law or commercial law concepts have limited application in section 64 proceedings. Indeed, it is those very concepts and the labour relations mischief which they caused which section 64 (and section 1(4)) is intended to remedy.

(See also *Gallant Painting*, [1991] OLRB Rep. Sept. 1051, *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366, *Aircraft Metal Specialist Limited*, [1970] OLRB Rep. Sept. 702, *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193.)

55. We find that Gaspo, Central Forming, Altracon, Ashworth and Pamina are engaged in related activities or business. Although the activities of these corporate entities are not identical (the scope of work of some being much broader than that of the others) we consider it more significant to focus on the nature of the work being performed and the work and skills of the employees who perform that work. These responding parties are or were all engaged in construction activities in which Carpenters are or may be employed. Thus, included in their construction activities is the performance of carpentry work by carpenters. The differences which do exist amongst the activities of the responding parties, although not irrelevant, are not such as would lead us to conclude that the activities of the responding parties are "unrelated" for purposes of subsection 1(4) of the Act.

56. We find that there is common direction and control between and amongst the respond-

ing parties Gaspo, Central Forming, Ashworth and Pamina. We do so, both on the material before us and by reason of the adverse inferences which we have drawn from the lack of production and lack of evidence produced by these responding parties. Mr. Spoletini and his wife own or control Gaspo and Central Forming. Mr. Spoletini's spouse is also a director of Pamina. Mr. Spoletini who controlled and directed the construction activities of Gaspo while it was engaged in the construction industry is now the Project Manager for Ashworth and is by reason of that position closely involved in the management and construction activities in which Ashworth is engaged. His management involvement in the affairs of Ashworth for example includes the representation of Ashworth in these legal proceedings before the Board. Mr. Thomas (ostensibly the sole owner, officer and director of Ashworth) and Gaspo are each contractually obliged to perform *identical* services on behalf of Ashworth. From a managerial perspective, there is nothing to suggest that anyone other than Mr. Thomas and Mr. Spoletini are involved in the day-to-day activities and operations of Ashworth. There is also nothing to suggest that anyone other than Mr. Thomas and Gaspo and/or Mr. Spoletini gain any of the financial rewards which accrue to Ashworth as a result of its construction activities. Ashworth and Gaspo operate out of the same business premises. Mr. Thomas is also a director of Pamina. The facts before us and the adverse inferences which we have drawn from the responding parties failure to adduce contrary evidence have caused us to conclude that the relationship between and amongst Gaspo, Central Forming, Ashworth and Pamina is not one rooted merely in commercial, truly arms length business relationships. The preconditions for a declaration pursuant to sub-section 1(4) are present in the relationships between and amongst Gaspo, Central Forming, Ashworth, and Pamina.

57. The preconditions for a declaration pursuant to sub-section 1(4) also appear to be present in the relationship between Altracon and Ashworth. On the face of the formal documentary evidence before us, there is common direction or control within these two corporate entities in the form of Mr. G. H. Thomas, a common director, officer and shareholder of both corporate entities.

58. There is however nothing which suggests that there has been any transfer of work, or any sale of all or part of Altracon's business, from Altracon to Ashworth or any other of the responding parties. Indeed, having regard to the evidence and material before us, the contrary appears to be the case. For some time now the *actual* business activities and relationships between Mr. Thomas and Mr. Lametti have been terminated, and have ceased to exist. There has been a parting of the ways. Mr. Lametti testified that Mr. Thomas has no actual involvement or real continued interest in the operations of Altracon, and Mr. Lametti has never had any actual involvement or interest in Ashworth. Mr. Thomas has at best only a nominal interest or relationship to Altracon, and only a notional participation in the affairs of that corporate entity, by reason of his continued directorship. The actual affairs of Altracon are handled by Mr. Lametti.

59. Just as the Board will look beyond the names of the directors, officers and shareholders and will "pierce the corporate veil" to determine the true direction and control of a corporate entity, similar reciprocal treatment to the facts before us has caused us to conclude that notwithstanding the formal arrangements or legal form, true direction and control of Altracon rests with Mr. Lametti.

60. There is also nothing in the evidence or pleadings to suggest that Mr. Lametti and/or Altracon has any interest in, or direction or control of any of the other responding parties. The only "link" which exists between Altracon and the other responding parties is Mr. Thomas. At best it is Mr. Thomas and not Mr. Lametti or Altracon which has "spun off" a new corporate entity (Ashworth) which is ostensibly "non-union". (Before the Board Mr. Lametti acknowledged that Altracon has, and continues to be bound to the carpenters' provincial collective agreement

and continues to recognize the bargaining rights of the Carpenters union in carrying out its construction activities.) Moreover it is Mr. Thomas who has a present and continuing relationship with the other responding parties.

61. On balance having regard to the entirety of the evidence and all of the circumstances before us we are not satisfied that, insofar as these applications relate to Altracon, the preconditions for the granting of a common employer or successor employer have been established. We are not satisfied that there is any common control or direction involving Altracon or Mr. Lametti, and we are not satisfied that there has been any “sale” of a “business” to or from Altracon. In the result, insofar as these applications relate to Altracon they are dismissed.

62. We turn then to the remaining issue of the exercise of our discretion as it relates to Ashworth, Gaspo, Central Forming and Pamina. In the absence of the common employer declaration the *potential* exists for the erosion of the trade union’s bargaining rights. Without such a declaration the work covered by the carpenters’ provincial collective agreement would not have to be performed or subcontracted by Pamina or Ashworth in accordance with the terms of that collective agreement. In the absence of such a common employer declaration for example, Pamina and Ashworth could engage a non-union concrete subcontractor to perform work which Gaspo might otherwise have performed in accordance with its collective agreement obligations.

63. In the construction industry, a trade union is not required to wait until actual erosion has been demonstrated before it is entitled to have its bargaining rights protected by a common employer declaration (see for example *West York Construction Limited*, *supra*, and *Kustom Insulation Limited*, [1979] OLRB Rep. June 531). The nature of the industry is so fluid and flexible that requiring a demonstration of actual erosion could seriously undermine the protection granted by section 1(4). The threat to the Carpenters bargaining rights exists in the presence of Pamina and Ashworth as general contractors carrying on related activities or businesses under common control or direction with Gaspo and Mr. Spoletini. In addition, if the common employer declaration was not granted Ashworth would in effect be able to rely on Gaspo’s, Mr. Thomas’ and Mr. Spoletini’s experience and expertise (or “necessary experience and knowledge required to manage, supervise and give consultation to Ashworth” to use the words of their contractual agreements) without the contractual obligations to which Gaspo, Mr. Spoletini and Mr. Thomas are bound with the Carpenters.

64. For these reasons we have determined to exercise our discretion in favour of granting the declaration sought by the trade union. Accordingly, in all of the circumstances of this application we declare that Gaspo, Central Forming, Ashworth and Pamina are to be treated as one employer for purposes of the *Labour Relations Act*.

65. We further declare that Gaspo, Central Forming, Ashworth and Pamina are bound to the provincial collective agreement between the Carpenters’ Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

66. Finally, we are not satisfied that it is appropriate in all of the circumstances to direct that Pamina and Ashworth are jointly and severally liable for the past damages which the Board has ordered Gaspo to pay by reason of its decisions dated February 19, 1993 and May 12, 1993. In our view the decision of the Board in *Golden Arm Flooring Inc.*, [1992] OLRB Rep. June 731 is somewhat different. There the Board ordered joint and several liability for damages which were awarded as a result of a grievance which had been filed after the application under subsection 1(4) of the *Labour Relations Act* had been filed. There is nothing in the material before us to indicate that at the time of the previous damage awards of the Board, either Mr. Thomas, Ashworth or Pamina were “related” to Gaspo, or involved in the projects which gave rise to those grievances.

The facts and circumstances arising as a result of those grievances appear to predate the present and continuing relationship between Ashworth, Pamina and Gaspo.

67. We are satisfied however that to the extent any damages flow from the grievances which form part of Board File No. 3667-93-G, it is appropriate to declare that the common employer declaration granted herein renders Gaspo, Central Forming, Ashworth and Pamina jointly and severally liable for those damages.

68. With respect to the referral of the grievance we have determined that there is insufficient evidence before the Board to enable the Board to make any decision in that matter. That lack of evidence is largely due to the failure of the respondents to produce the documents ordered to be produced or to otherwise tender evidence in this matter. In the circumstances we do not consider it appropriate to dismiss the grievances for lack of evidence thereby benefitting the very parties which have failed to comply with the Board's orders. Accordingly, Board File No. 3667-93-G will therefore be re-listed for hearing. The dates for that hearing will be set by the Registrar. The Registrar will initially consult with the parties concerning those dates. In the event however that the parties are unable to mutually agree upon suitable dates, the Registrar may set the dates of hearing without further consultation.

69. We note that the issues arising in Board File No. 3667-93-G are several and separate from the issues which this panel has determined in dealing with Board Files 3666-93-R and 3857-93-R. The panel has not heard any evidence nor has it made any determinations with respect to the referral of a grievance. In the circumstances this panel is therefore not seized with hearing that matter.

0840-93-U Centre Jubilee Centre, Applicant v. United Steelworkers of America, Gerry Loranger, Brian Shell, Responding Parties

Duty to Bargain in Good Faith - First Contract Arbitration - Interest Arbitration - Practice and Procedure - Unfair Labour Practice - Employer complaining of bad faith bargaining where union put certain issues to interest arbitrator which had not been pursued in bargaining - Board finding nothing illegal about raising "new" issues or changing position in course of submissions to arbitration - Once arbitration process invoked, it is for arbitrator to decide what terms of first agreement will be - Board concluding that facts pleaded disclosing no violation of the Act - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *H. Peacock*.

DECISION OF THE BOARD; July 18, 1994

1. This is an application under section 91 of the *Labour Relations Act*, alleging that the union has contravened section 15 of the Act - "the duty to bargain in good faith". The employer asserts that the union breached section 15 when it applied for "first contract arbitration" [section 41 of the Act] and submitted for the arbitrators' consideration:

- (a) an item on training which had not surfaced in the earlier bargaining;

- (b) an item respecting the discharge of an employee which the union had withdrawn during bargaining, indicating that it would deal with it separately; and
- (b) a proposal respecting retroactivity which was different from the one proposed during bargaining.

The employer asserts that putting these issues to the arbitrators was a breach of the union's section 15 "bargaining duty". Section 15 reads as follows:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and *they shall bargain in good faith and make every reasonable effort to make a collective agreement.*

[emphasis added]

2. When the first contract arbitration proceeding began before the arbitration board, the employer opposed any award on the disputed items. The employer pointed out that they were the subject of these unfair labour practice allegations, and asserted that the arbitrator could not or should not deal with them. The union asserted the contrary.

3. The board ruled that it had jurisdiction to proceed, and made an award which, among other things, addressed these three issues. As we understand it, the employer seeks a remedy from this Board which would strike these now adjudicated items from any collective agreement.

4. Having reviewed the facts pleaded by the employer, we are not persuaded that they disclose any breach of section 15 of the Act. Interest arbitration is not bargaining. It is a substitute for bargaining; and once the interest arbitration process is triggered collective bargaining, as such, has ended (although, of course, the parties may still decide to compose their differences in the shadow of the arbitration proceeding, even though they might not be required to seek a negotiated settlement at that stage). If the section 15 duty subsists in a formal sense until the terms of the collective agreement are actually handed down by the arbitrator, it must nevertheless be interpreted in light of, and in conjunction with, an arbitration process that preempts the normal bargaining mechanisms. (See for example sections 41(13) and 41(13.1) which suspend the right to strike/lockout).

5. Nothing in the statute confines the parties' arbitration submissions to what they have negotiated about during the course of bargaining - provided that there has not been *written* agreement on any item submitted to the arbitrator (see section 41(17) of the Act). Indeed, the bargaining preceding the reference to the Minister may not have been very productive or complete at all, and that is why one party or the other may opt for "first contract arbitration". The statute requires the parties to stipulate the terms of a proposed collective agreement that each of them is prepared to sign (section 41(1.4)). However, the statute does not limit the terms of such proposed agreement to terms that have previously been discussed, nor prohibit reference to issues which have not been raised before, or have been "withdrawn".

6. Nor is an arbitrator's jurisdiction so limited. In settling a first agreement the arbitrator is bound to include any item upon which the parties have agreed; but apart from that, s/he has a wide discretion to prescribe any terms which s/he considers appropriate in the circumstances. The matters in dispute are those that either party chooses to put to the arbitrator for determination (perhaps illuminated by the proposals filed pursuant to section 41(1.4)). Those issues may or may not mirror the items pursued in bargaining - again, so long as the parties have not actually settled a

particular issue, in writing - and what the arbitrator ultimately decides may or may not reflect the position which the parties have previously taken.

7. It may be unwise for a party to raise before an arbitrator matters which have not been pursued in bargaining. An arbitrator might be disinclined to award a request that a party did not see fit to raise earlier. Similarly, it may be wiser for a party to "sign off" (i.e. settle in writing) any particular issue on which agreement is reached, lest the matter later surface as part of the mix of issues before an arbitrator. But there is nothing illegal about raising "new" issues or changing one's position in the course of the submissions to arbitration. And once the arbitration process is invoked, it is for the arbitrator to decide what the terms of the first agreement will be.

8. We see no breach of section 15 in the facts pleaded by the employer.

9. However, even if there were a *prima facie* or arguable case for a breach of section 15 (which we find there is not) we would exercise the Board's discretion under section 91 of the Act *not to inquire* into this particular complaint.

10. The items in question have all been put before the arbitrator for his consideration. The employer has had an opportunity to argue, on various grounds, that the arbitrator should not deal with them. However, despite these employer objections, the arbitration board decided that it should proceed, and decided further that it should adjudicate the disputed items in conjunction with the other issues in dispute, and the other matters that he had to determine to settle a first collective agreement. Both parties had an opportunity to address the content of the collective agreement, and the arbitration board made its decision in light of those representations and its own judgement of what was appropriate.

11. We see no reason, at this stage, to interfere with the results of that arbitration process. Nor, at this stage, would we be inclined to grant the remedy which the employer requests or interfere with the terms that the arbitration board has prescribed.

12. We see no labour relations purpose for a Board enquiry into this complaint, and in accordance with the discretion under section 91 of the Act we decline to do so.

13. For the foregoing reasons, this application is dismissed.

4534-93-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant v. Cineplex Odeon Corporation, Responding Party

Bargaining Unit - Combination of Bargaining Units - Employer operating movie theatres across Ontario and North America - Over two month period, union having organized seven “front-of-house” bargaining units located in Brampton, Scarborough, Mississauga, Guelph, Sudbury and Toronto - Board allowing union’s application under section 7 of the Act to combine the bargaining units

BEFORE: *Judith McCormack*, Chair, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *Bernard Fishbein*, *J. Watterhouse* and *A. Olsen* for the applicant; *David N. Corbett* for the responding party.

DECISION OF JUDITH McCORMACK, CHAIR, AND BOARD MEMBER

P. V. GRASSO; July 22, 1994

1. This case involves an application under section 7 of the *Labour Relations Act* in which the applicant union seeks to combine seven bargaining units in theatres in Ontario. The responding party is a movie chain corporation which operates across North America.

2. The parties were in agreement with respect to the facts in this matter. For the most part, the employees for whom consolidation is sought work as ushers, cashiers and concession attendants, and are described by the parties as the “front-of-house” staff. The seven bargaining units, which range in size from eight to thirty employees, constitute all the units of this nature that the applicant has organized to date. Each involve one location, except for the Brampton unit which includes two. The other units are located in Scarborough, Mississauga, Guelph, Sudbury and Toronto. The work performed in the theatres is virtually identical. This is true as well for the terms and conditions of employment. Each theatre has a manager, and in most cases an assistant manager, and their responsibilities include hiring, firing, discipline and other personnel matters. In addition, there are district managers who wield the ultimate control in these matters. There is some interchange of employees between some of the units. The units were all organized over a period in January and February of this year. None of them are covered by a collective agreement. If the units were combined, the total number of employees in the combined unit would be approximately 110 to 120.

3. Section 7 provides as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates

with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.

3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;**
- (b) would reduce fragmentation of bargaining units; or**
- (c) would cause serious labour relations problems.**

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

(emphasis added)

4. Since this case does not involve either a manufacturing operation or the construction industry, we find it helpful to set out some of the Board's comments with respect to its approach to section 7(3) in *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523. In the following passages, the Board reviewed some of its earlier jurisprudence with respect to the importance of minimizing fragmentation in facilitating viable and stable collective bargaining:

6. The task of facilitating viable and stable collective bargaining in connection with bargaining units is familiar territory for the Board, which has explored this theme extensively in the context of determining appropriate bargaining units at the point of certification. This is true as well for the proposition of reducing fragmentation, since the Board has sought to avoid undue fragmentation in shaping units. Much of the Board's jurisprudence reflects a relatively sophisticated approach to these issues, which has evolved over a number of years of considerable experience. Accordingly, we find it useful to review some of that jurisprudence under section 6 in considering these criteria in the context of combining bargaining units as well.

7. We observe firstly that viability, stability and fragmentation have been interwoven in the Board's determination of bargaining units. A review of the cases indicates that the Board has considered more comprehensive bargaining units and minimizing fragmentation to be key elements in facilitating viable and stable collective bargaining. For example, in *The Board of Education for the City of Toronto*, [1970 OLRB Rep. July 430], the Board expressed the view that fragmentation may make it impossible to have a viable and meaningful collective bargaining relationship:

18. The fact-finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, [1969] January OLRB Mthly. Rep. 1016.

8. The British Columbia Labour Relations Board set out the same kind of factors favouring broader bargaining units in the *Insurance Company of British Columbia*, [1974] 1 Can LRBR 403 (adopted by this Board in *National Trust*, [1986] OLRB Rep. Feb. 250) where it said at p. 259 as follows:

The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.

* * *

A second administrative factor, this one clearly in the interest of both employer and employees, is the matter of *lateral mobility*. The presence of several bargaining units, each with their seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee whose place of residence may have changed and who thus needs a different job or the employee who wants to improve his job position through promotion to a position which has come open in another division. It also restricts management's range of selection among qualified persons to fill a job.

* * *

The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on. ICBC has developed a wage structure whereby all the positions across every division have been evaluated and placed in some coherent relationship one to the other. It is unlikely that this pattern would continue if there were two units represented by different unions. Indeed, if we did not expect different terms of employment to emerge, there is no reason to allow separate representation for groups of employees.

* * *

Another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately.

9. In *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, the Board noted that in striving to create a viable structure for collective bargaining, a broadly based bargaining unit offers several advantages over a fragmented structure, and went on to elaborate on the undesirable effects of fragmentation, including the increased risk of work stoppages:

15. Organizational concerns are not the only forces that shape bargaining units. The

Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRB 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance sic] the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. *All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.*

(emphasis added)

10. Similarly, in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, the Board suggested that fragmentation could contribute to labour management problems, tension within and between bargaining units, and an escalation of industrial conflict, and described fragmentation as “a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unraveling”. And in *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7, the Board noted that fragmentation could result in a weak employee presence at the bargaining table.

11. In other words, it is well established in the Board’s jurisprudence that facilitating viable and stable collective bargaining in the context of bargaining unit determinations is strongly connected to minimizing fragmentation.

5. With this in mind, we turn to the application of section 7(3) to the case before us. The company acknowledges that combining these units would minimize fragmentation. As the cases above reflect, the Board has found that minimizing fragmentation is a key element in facilitating viable and stable collective bargaining. There was no evidence which would suggest that the usual reasons for reducing fragmentation including administrative efficiency and convenience, lateral mobility, a common framework of employment conditions, and industrial stability would not apply to this case. Indeed, the similarity in the functions performed by employees and their working conditions imply the contrary.

6. The company opposes the application on the basis that the union had an obligation to advise both the company and employees at the time it filed the certification applications that it would subsequently be requesting a combination order. Although counsel acknowledges that noth-

ing in section 7 precludes the union from applying for such an order at this point, in two of the certification cases the bargaining units were disputed. In counsel's view, the fact that the union requested smaller bargaining units in those cases for organizing purposes should lead the Board to exercise its discretion to refuse to combine the units now. Although he agrees that this is not a matter of *res judicata* or issue estoppel, he takes the position that the appropriate time for the union to have asked for combination orders was as each unit was certified. However, he acknowledges that the Act is designed to facilitate organizing, and that a combination order would reduce fragmentation. He also conceded that all of the Board's jurisprudence was against his position.

7. There is no dispute that the union is legally entitled to apply for combination at this point. Rather the company's arguments appear to suggest that we should apply an estoppel-like concept in the absence of the usual requirements of that doctrine. As noted earlier, it is not asserted that the union misled the company or employees by advising them that it would not be requesting combination at any subsequent point, or that it is resiling from some agreement. No prejudice or detriment to the employer was cited, except for the fact that the union was certified in the earlier proceedings. In essence, the company's position is really that there is a sort of vague inequity to this sequence of events which should outweigh the criteria in section 7(3) and the Board's jurisprudence.

8. There are several problems with this argument. If it is based on the union taking a different position in these proceedings than in two of the earlier certification cases, the same argument would apply to the company, which argued for larger bargaining units previously and is now opposing one. More importantly, however, it ignores the fact that certification and combination are quite distinct types of actions and that the tests the Board applies, while overlapping, are indeed different. As the Board noted in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the issue in certification cases is whether the unit which the union seeks to represent encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. While some elements of the Board's jurisprudence in the context of this test are echoed in the criteria set out in section 7 and the Board's cases under it, there are factors which are not.

9. As the Board has observed previously, when it fashions bargaining units in certification cases, its approach to fragmentation is mitigated by an opposing concern to facilitate access to bargaining. In *Loeb Highland*, [1993] OLRB Rep. Mar. 197, the Board considered some of its prior jurisprudence in this regard:

In certification cases, however, this is tempered by an opposing concern that bargaining units not be described so broadly that they impede access to collective bargaining. In *Ryerson*, *supra*, the Board noted that assisting employees to join together for collective bargaining was a fundamental objective of the *Labour Relations Act*, and that as a result, the Board has been reluctant to establish units that are so broadly based that they defy organization:

14. A trade union may experience insurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point

that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

* * *

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited*, *supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

12. In the same vein, the Board said in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330:

In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all.

13. Indeed, in *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the Board expressed the view that "[w]here, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization".

10. Similarly, in *The Hudson's Bay Company*, [1993] OLRB Rep. Oct. 1042, the Board reviewed its extensive jurisprudence in certification applications with respect to fostering self-termination and facilitating access to collective bargaining in determining bargaining units:

26. In other words, the Board may consider factors in fashioning bargaining units at the time of certification which may be less relevant in combination applications where employees are already organized. For example, in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7, the Board noted that in determining appropriateness the Board had developed two general themes of fundamental importance, the right of self-organization and the need for a viable collective bargaining relationship:

Two themes of fundamental importance appear to emerge from these sources, the right of self-organization and the need for a viable collective bargaining relationship.

A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between

employers and trade unions as the freely designated representatives of employees.” More specifically, s. 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, (1969) OLRB M.R. 340.

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but “the unit of employees that is appropriate for collective bargaining.” In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, (1973), OLRB M.R. 102, and in the *Board of Education for the City of Toronto* case, *supra*.

27. More specifically in *Coca-Cola Ltd.*, [1989] OLRB Rep. Jan. 1, the Board referred to *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656 in setting out the reasons for the one location practice in certification which included, among other things, the right to self-organize, and providing a measure of predictability for organizing purposes. In the latter case, the Board included these quotes from *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491 in discussing the one location practice and awarding a multi-location bargaining unit:

29. This does not mean, however, that a regional bargaining unit will never be appropriate. Rather it simply means that such a unit must be consistent with two basic considerations - 1) the right of self-organization; 2) the requirement that collective bargaining relationships be viable.

* * *

30. In this case, the applicant has organized all but one of the stores falling within its proposed bargaining unit description, virtually eliminating any interference with the right of self-organization. This means that in this case considerations of viability assume greater importance.

28. Again in *Tip Top Tailors*, [1979] OLRB Rep. May 445, the Board also ties in its policy on bargaining unit certifications to the right of employees to obtain union representation, among other things:

20. Having reviewed all of the foregoing and in particular the evidence with respect to transfers, the Board finds that the extended area bargaining unit argued for by the respondent raises an insurmountable obstacle to the rights of any of the employees to obtain union representation. That right is the foundation and base upon which the whole structure of the Act is built. To require the employees of the respondent to organize the whole area which includes so many municipalities would be to defeat the paramount purpose of the Act.

29. Initially the Board determined that a municipality wide unit was appropriate for stores (*The Goodyear Service Stores* (1964), 65 CLLC ¶16,018). However, in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, the Board found that either a one branch unit or a unit consisting of all branches in Southwestern Ontario shared a community of interest. In deciding to certify a one branch unit, the Board again referred to its concerns about access in the passage

cited in *Mississauga Hydro-Electric Commission*, *supra*, and adopted the views of the British Columbia Labour Board to this effect:

27. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] 1 C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia*, (No. 2) decision of the same Board:

“However, clearly one can’t have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union’s representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.”

30. In *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the Board identified three statutory objectives which must be balanced in determining the appropriate unit in certification applications:

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade union to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case.

31. The Board also noted that the concern about fragmentation was weightier where the Board was unable to restructure bargaining units at a future date, as was the case at that time:

11. There are other important considerations which enter the picture as well where the employer operates from two or more locations within the same municipality. Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern or organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date.

32. Many of the single branch determinations in this sector can be explained by the following passage in *K Mart*, *supra*:

18. As noted earlier the Board must balance a number of statutory objectives in the exercise of its discretion under section 6(1) of the Act to determine which is the appropriate bargaining unit in any given case. It is clear from a review of the authorities that the blanket policy enunciated in the *Goodyear* decision, *supra*, with respect to the geographic scope of bargaining units, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area, has given way to a series of considerations which must be made in each case. Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there

may be more than one appropriate unit in any given case. Where there is more than one appropriate unit the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. It follows that in doing so the Board takes into account the pattern of organization. Furthermore, in making its determination, the Board will be mindful of the precedential impact of its decision. Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization.

33. The Board noted in *K Mart* that in the earlier cases of *Goodyear, supra*, and *Cybermedix Limited*, [1979] OLRB Rep Aug. 743, the union had organized all employees in the municipality and was requesting a municipality wide unit, as had the union in *Fotomat Canada Limited*, [1979] OLRB Rep April 306 and in *Tip Top Tailors*, [1979] OLRB Rep. May 445. In that sense, these cases were not inconsistent with *K Mart* decision, the Board said, the latter two because the Board gave favourable consideration to the pattern of union organizing, and took into account the adverse effect upon access to bargaining:

17. The Board has reviewed both *Fotomat, supra*, and *Tip Top Tailors, supra*, relied upon by the respondent. The primary issue in both cases is different than that raised in the instant case. In both cases the Board was asked to depart from its standard practice of circumscribing bargaining rights by reference to the municipal boundary and to certify on a broader basis. While the Board refused, and certified for all stores within single municipalities, in both cases, its reasons for doing so lend support to the position of the applicant in this case. In both these cases the Board gave favourable consideration to the pattern of union organizing, as the applicant asks us to do in this case. In both cases, as in the *Goodyear* and *Cybermedix* cases the union organized on a municipal-wide basis. Furthermore, in both cases the Board took into account, as the applicant asks us to take into account in this case, the adverse effect upon employee access to collective bargaining of unit descriptions extending beyond a single municipality. The Board commented in its *Fotomat* decision that any drawbacks associated with the possibility of the respondent having to deal with a multiplicity of bargaining units “are more than outweighed by the restrictive effect that a single bargaining unit would have on the right of the respondent’s employees to decide whether or not they wish to be represented for collective bargaining purposes”. Similarly in its *Tip Top Tailors* decision the Board found that “the extended bargaining area argued for by the respondent raises an insurmountable obstacle to the rights of any of the employees to obtain union representation.”

34. In *National Trust*, [1986] OLRB Rep. Feb. 250, the Board reviewed the jurisprudence in the service sector at great length. Among other things, the Board was prepared to grant a multi-location bargaining unit even at the point of certification as an option available to an applicant, without signalling a rejection of single branch units:

13. The preamble to the *Labour Relations Act* discloses a clear legislative predilection toward the fostering of collective bargaining, and nowhere has that predilection been reflected more than in the determination of the “appropriate” bargaining unit under section 6(1). Each time the Board is persuaded to move to a further stage in bargaining-unit determinations, the history of the jurisprudence shows that the effect of that movement generally is to increase the options available to unions for organizing in the province. Exactly as applicant counsel has argued, in other words, the finding, if the Board were to make it, that a grouping of seven certifiable branches within Metro is the appropriate bargaining unit in the facts and circumstances of this case, would not in any way signal a rejection of the basis on which single-branch units have in the past been, or in the future would be, found to be appropriate (or the basis upon which they have been agreed to be appropriate in the present case).

(emphasis original)

This was adopted by the Board in both *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226 and in *Famous Players*, [1990] OLRB Rep. May 509, and the case is cited in other respects in *VS Services Ltd.*, [1987] OLRB Rep. June 931 and *The Board of Education for the City of*

Scarborough, [1987] OLRB Rep. Jan. 119. The Board went on to quote from *Canada Trustco*, *Woodward Stores*, *Insurance Corporation* and *K Mart*, *supra*, in this regard, and noted the British Columbia Labour Board's practice of certifying single branch store units and combining them subsequently. However, the Board also observed that neither the practice of this Board to certify single store or branch units or the B.C. Board's practice in this regard vitiated the overall principle that "bigger is better" in terms of issues such as fragmentation. Rather, they reflected the Board's concerns about access to collective bargaining.

35. *National Trust*, *supra*, was quoted at length in *Famous Players* where the Board found a single theatre to be an appropriate unit. Again, the Board's decision is based in part on the obstacles to organizing a municipal-wide unit would create:

Although fragmentation and a potential multiplicity of bargaining units could result if a single theatre is found to be appropriate, as the jurisprudence recited indicates, those legitimate and significant concerns must be weighed against the obstacles to organizing that would be created by finding a multi-branch bargaining unit to be the only appropriate bargaining unit.

9. It may well be that the employer's prediction will prove to be accurate and the bargaining unit sought by the applicant will not provide it with sufficient bargaining strength to secure any significant gains for the employees. But this potential bargaining strength problem does not warrant the conclusion that bargaining would not be viable in what is otherwise an appropriate unit, a unit where employees share a sufficiently coherent community of interest.

36. In summary then, in certification applications the Board has considered a number of factors relating to facilitating organization and fostering self-determination which may not be relevant to combination applications, or which may have different implications in this context. As a result, these cases do not suggest to us that the units before us should not be combined.

11. As a result, the Board's approach to combining bargaining units involves both a degree of commonality with the factors it considers in certifications and some significant differences. In *Mississauga Hydro*, *supra*, for example, the Board noted that access to bargaining may not be an issue in a combination application, either at all or in the same form. When the Board's predilection for minimizing fragmentation is freed from concerns about self-determination and access to bargaining, the effect in the context of a combination application may be a stronger preference for larger units than in certification applications:

At the same time, it is also evident that the Board's approach to combining bargaining units must be somewhat different than the method the Board uses to structure those units at the point of certification. Although the criteria in section 7(3) echo some of the themes addressed by the Board under section 6, there are some notable absences. Section 7(3) does not employ the language of appropriateness set out in section 6, and there are obvious differences in the kinds of factors relevant even to viability. For example, the Board may not have the same concern that larger bargaining units might impede the right of employees to organize themselves in a combination application, when access to collective bargaining is not an issue. This brings the problems associated with fragmentation and its impact on viable and stable collective bargaining into sharper focus. Indeed, in the absence of this concern, the Board's views on the undesirable impact of fragmentation may suggest a more marked preference for larger units. Likewise, the Board's approach to displacement applications for certification is shaped to some extent by specific considerations with respect to gerrymandering, which may take a different form in the context of combination applications.

12. This difference in approach is also reflected in the certification decisions for two of the seven bargaining units before us. Both rely on *Famous Players*, *supra*, where the Board considered obstacles to organizing as one of the factors in arriving at a determination of a single branch unit. There may well be combination cases in which access to bargaining or fostering self-determination is an issue, although it may arise in a different manner or have varying implications than in the con-

text of a certification application. In this case, however, it is not a factor. The result is that the Board has the relative luxury of applying the criteria under section 7 in a manner which reflects the accumulated wisdom of its jurisprudence with respect to minimizing fragmentation and facilitating viable and stable collective bargaining, undiluted by some of the concerns that may arise at the point of certification.

13. In light of the criteria in section 7(3), the Board's different jurisprudence in these areas and the fact that access is not an issue before us in this combination application, the company's argument amounts to the proposition that a party should not be permitted to take a different position on a different issue in a different type of case because some of the factors the Board considers are similar.

14. What lies behind this argument, we think, is that the company feels aggrieved because the union has been able to draw on support from the Board's respective areas of jurisprudence in both the certification and combination proceedings. As the Board observed in *Mississauga Hydro*, *supra*, however, it is well aware that the parties' positions in both certification and combination cases are often shaped to a significant degree by strategic considerations. In the absence of facts which suggest that the integrity of the Board's processes are threatened, or which amount to estoppel or *res judicata*, the Board is generally reluctant to get caught up in the parties' litigation manoeuvres or to allow them to influence the substance of its decisions. It is also far from clear that the company would be in a better position if the union had brought combination applications with each certification, as the company asserts would have been preferable.

15. Alternatively, counsel asks that the Guelph and Sudbury locations remain separate units on the basis that this would be similar in some respects to the projectionists' units represented by locals of the same international union which seeks the order in this case. In that regard, counsel disagrees with the premise that "bigger is better" in connection with bargaining units. He asserts that there would be more Toronto employees in a combined bargaining unit than those from Sudbury, for example, and that they might vote for a strike where employees from Sudbury would not. If the Sudbury theatre is less financially viable than those in Toronto, counsel argues, the effect might be problematic. While he acknowledges that the Board's cases do not support the proposition that geographically separate units should not be combined, he is still of the view that Guelph and Sudbury should be kept separate.

16. It must be acknowledged, however, that this is a very speculative concern, assuming as it does financial data which was not in evidence, a failure to reach a collective agreement, a vote in which regional differences were both relevant and ignored, a union insensitive to these interests, and a number of other contingencies which we have no particular reason to presume. We note that section 7 refers to *serious* labour relations problems, and not simply labour relations problems. The mere possibility of difficulties of such a conjectural nature does not appear to fit the criteria in section 7. Moreover, although counsel pointed to the projectionists' units as the inspiration for such a configuration, it is apparent that this would not perfectly mirror the projectionists' units in any event. And to the extent that those units represent some historical anomalies with a craft flavour, this pattern does not recommend itself to us in a fresh area of collective bargaining. We also accept that in labour relations matters such as this, the duly certified bargaining agent speaks for employees, either exclusively or at the very least with considerable authority.

17. Having regard to the criteria set out in section 7 and the Board's jurisprudence, we conclude that combining these units would reduce fragmentation and facilitate viable and stable collective bargaining without causing serious labour relations problems. As a result, we direct that the

seven bargaining units before us be combined. We remain seized with regard to any further remedial relief.

OPINION OF BOARD MEMBER W. H. WIGHTMAN; July 22, 1994

1. There can be no doubt that under existing law the Board has the discretionary power to direct that the seven bargaining units be combined.
 2. Indeed it would seem the Board would be hard put to deny any bargaining unit configuration requested by any union, whether in the context of a certification application or a subsequent application under section 7, to combine units.
 3. The reservations I have as to the advisability of doing so stem on the one hand from a concern as to the extent to which the decision reflects the wishes and serves the interests of individual employees, and on the other the implications of the decision for coherency in Canadian systems of collective bargaining. The latter point I deal with first it being more philosophical in nature.
 4. The most apparent distinction between collective bargaining systems in western Europe and those to be found throughout Canada is reflected in the manner in which negotiations are conducted. European models have evolved what some describe as “top down” bargaining, an expression coined by North Americans to distinguish those models from our systems wherein negotiations are more typically at a local level in virtually all private sector industries other than construction.
 5. This is not to argue that one model is to be preferred over the other but it is at least arguable that our “bottom up” approach to collective bargaining is to some degree predicated on a notion that the closer decisions are made to and even by the people who will be directly affected, the more sensitive the decisions will be to local conditions and needs.
 6. The strategic benefit to the union is apparent in the majority decision to combine all seven units. Any benefit to the individual employees is much less evident. I suppose that as members of a single bargaining unit it might be possible for ushers to move about between Sudbury and Toronto by virtue of seniority rights in the event of a lay-off. Such a benefit strikes me as less likely, and less appealing, than for employees at Sudbury and Guelph to be able to negotiate provisions which would address their own needs and interests.
 7. As a Board we have no knowledge as to the preferences of the individual employees. Absent that knowledge I would have opted for a structure which allowed for the possibility of more local decision-making and left the Guelph and Sudbury locations as separate units.
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0243-94-JD The Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 598, Applicant v. Labourers' International Union of North America, Local 1059 and **Dafoe Floor Concrete Construction Ltd.**, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Labourers' union opposing Operative Plasterers' union's request to withdraw its jurisdictional dispute application - Board expressing view that it should hear complaints where dispute over correct assignment of the work continues to exist, unless there are compelling reasons not to do so - Board persuaded that leave to withdraw complaint should not be granted

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *N. L. Jesin* for the applicant; *John Moszynski* and *Jim McKinnon* for Labourers' International Union of North America, Local 1059; no one appearing for Dafoe Floor Concrete Construction Ltd.

DECISION OF THE BOARD; July 15, 1994

1. This jurisdictional dispute complaint was scheduled for consultation to be held on July 14, 1994. By letter dated July 13, 1994 counsel for the applicant ("Operative Plasterers") requested leave of the Board to withdraw its application. On July 14, 1994 counsel for the responding trade union ("Labourers") indicated that the Labourers opposed the request to withdraw and submitted that the Board should proceed with the consultation, determine this matter on its merits and direct that the work in dispute be properly assigned to the Labourers. In the result, we heard the submissions of both counsel with respect to this issue.

2. We have carefully considered the submissions of both parties particularly insofar as each raised competing "policy" concerns in support of their respective positions. We do not propose to detail those able submissions. It is sufficient to note that pursuant to section 91(1.1) the Board has a discretion in these matters as it "*may* consult with the parties affected by the complaint to resolve any matter raised by the complaint or *may* inquire into any matter raised by the complaint, or *may* do both".

3. When confronted with an opposed request to withdraw an application of this nature, the Board exercises its discretion depending on the particular facts and circumstances with which it is faced. Thus, for example, in *E.S. Fox*, [1990] OLRB Rep. May 504; *J. R. Mechanical*, [1991] OLRB Rep. Aug. 999 and *Inplant Contractors Incorporated*, (unreported decision dated October 5, 1992, Board File No. 2827-90-JD) the Board *granted* leave to an applicant to withdraw a jurisdictional dispute complaint or otherwise terminated a jurisdictional dispute and exercised its discretion not to inquire into a complaint. On the other hand in *Vic West Steel*, [1993] OLRB Rep. Mar. 256; *Steen Contractors Limited*, [1986] OLRB Rep. May 677 and *Comstock Canada*, [1993] OLRB Rep. Aug. 740, the Board *refused* a party's request to withdraw and refused to dismiss or otherwise terminate a jurisdictional dispute complaint, and instead exercised its discretion by continuing its adjudication of the dispute over a work assignment as requested by one of the parties.

4. In all of the circumstances of this case we have determined not to grant leave to the applicant to withdraw this application. The applicant has stated that its request to withdraw is not to be construed as a concession that it no longer claims entitlement to the work which it had been assigned. The grievance which has been filed by the Labourers and which underlies this jurisdic-

tional dispute has not been resolved or dealt with. It is clear that the two trades are still in dispute over the correct assignment of the work. It is equally clear that the Canadian Plan for the Settlement of Jurisdictional Dispute in the Construction Industry ("the Plan") has not, and will not, determine the merits of this dispute because the work has long since been completed. It is not clear whether the Labourers are stipulated to the Plan or have otherwise agreed to be bound by the decisions of that Plan in respect of this matter. Certainly, it is clear that the terms of the Labourers' collective agreement pertaining to the industrial, commercial, and institutional sector of the construction industry obliges that union to pursue jurisdictional dispute complaints or complaints with respect to the assignment of work before this Board.

5. It is clear that this Board has the jurisdiction to hear this complaint. In our view, given the current provisions of the *Labour Relations Act* and the expeditious manner in which this Board is now able to deal with jurisdictional dispute complaints in the construction industry, the Board should hear those complaints where a dispute over the correct assignment of the work continues to exist unless there are compelling reasons not to do so.

6. In the circumstances of this case there has not been any determination with respect to the work assignment dispute, although that dispute continues to exist. Moreover, it is not clear what, if any effect the procedural determinations which have been made by arbitrator Robert Belanger pursuant to the provisions of the Plan will have, or are intended to have, upon the Labourers' grievance against the employer Dafoe Floor Concrete Construction Ltd. There is some suggestion from the Operative Plasterers (and perhaps the employer Dafoe Floor Concrete Construction Ltd.) that the hearing of that grievance may not, or should not proceed given the provisions of the Plan and Mr. Belanger's decision. If that is the case, the result would be to prevent the Labourers from pursuing their claim to damages as a result of the alleged improper assignment of the work, while at the same time precluding the adjudication of the work assignment dispute (notwithstanding the fact that there has not been any determination of the merits of that dispute and the Labourers and Operative Plasterers each continue to claim the work.

7. In all of the circumstances we are persuaded that leave to withdraw this complaint should not be granted. In so doing we agree with and adopt the decision of the Board in *Comstock Canada, supra*, particularly paragraphs 4 and 5 of that decision.

8. This matter is referred to the Registrar for the scheduling of a consultation in this matter pursuant to the provisions of section 91 of the Act.

9. This panel is not seized.

2348-93-G; 3808-93-G International Union of Operating Engineers, Local 793, Applicant v. **Elirpa Construction and Materials Limited**, Responding Party v. Metropolitan Toronto Sewer and Watermain Contractors Association, Interested Party

Construction Industry - Construction Industry Grievance - Board determining that employer who is not member of accredited employer association is not bound by agreement made by association for other than geographic area and sector for which it is accredited - Board finding that cross-over clause of sewer and watermain collective agreement not applicable to responding employer in road building sector

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *G. McMenemy*.

APPEARANCES: In Board File No. 2348-93-G *L. Steinberg* and *R. Kennedy* for the applicant; *C. E. Humphrey*, *A. Renton* and *M. Aprile* for the responding party; *Richard Charney* for the interested party.

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER J. A. RONSON; July 29, 1994

1. These are referrals of construction industry grievances to arbitration under section 126 of the *Labour Relations Act*. By decision dated April 27, 1994 [now reported at [1994] OLRB Rep. April 372], the Board decided that the applicant, referred to below as the union or Local 793, had not abandoned its bargaining rights in the road building sector. This decision deals with the second issue underlying these grievances, i.e., the effect of what is known as a "cross-over clause" on an employer who is not a member of the accredited employer organization who has negotiated it.
2. The April 27, 1994 decision set out at some length the arguments of the parties and the facts in Board File No. 2348-93-G. We will refer to them in more summary form here. That decision also invited submissions from the Toronto Sewer and Watermain Association, (which will be referred to as the Association below). The thrust of the submissions which the Board received from the Association are set out below.
3. Local 793 obtained bargaining rights for employees of the responding party ("Elirpa") on January 31, 1986 in the industrial, commercial and institutional ("ICI") sector and all other sectors of the construction industry in Board Area No. 8. Elirpa has worked in both the sewers and watermain and roads sectors throughout the relevant time period. No collective agreement had been entered into by the parties in the roads sector at the time of the hearing of these matters. Nonetheless, the union says the employer must pay union rates for roads work because of a cross-over clause in a sewers and watermain collective agreement to which the parties are bound. Union counsel says the effect of the cross-over clause is to incorporate the road builders collective agreement by reference into the sewer and watermain agreement.
4. The parties became bound by the collective agreement between the Metropolitan Toronto Sewer and Watermain Contractors Association and the union ("the sewer and watermain agreement") following a 1989 accreditation order. See *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1989] OLRB Rep. Dec. 1226. The employer takes the position that the authority given to the accredited association, of which Elirpa is not a member, is only to bargain on behalf of Elirpa within the sector and geographical area for which it was granted accreditation. Thus it resists the application of the cross-over clause to the roads sector.

5. The cross-over clause in issue, section 15.5 of the sewer and watermain agreement, provides as follows:

15.5 If an Employer covered by this Agreement engages in work other than Sewer and Watermain construction, and such other work comes within the purview of the existing Collective Agreement between the Union and The Metropolitan Toronto Road Builders' Association, the rates of pay and conditions of work of that Agreement shall apply. Similarly, if an Employer covered by this Agreement engages in work generally recognized as heavy construction (overpasses, bridges, etc.), the rates and conditions prevailing in the Collective Agreement between the Union and the Operating Engineers Employer Bargaining Agency shall apply. It is further recognized that on all subway construction for the T.T.C., GO Transit or other public transportation systems, the rates and conditions of the Agreement between the Union and the Operating Engineers Employer Bargaining Agency shall apply.

6. The accredited association clearly has the right to bargain for Elirpa in the sewer and watermain sector, pursuant to the 1989 accreditation order. The union argues that once the Association has the authority to bargain on behalf of Elirpa, whatever it negotiates binds the company. It cannot pick and choose portions of the collective agreement. The Union also referred to *Re. International Association of Heat and Frost Insulators*, 103 DLR (4th) 401 (N.S.C.A.). The union's fundamental argument is that the Ontario legislation is framed in broad terms, without any restrictions on what kind of agreement can be reached, and it would be inconsistent with the scheme of the Act to accept the employer's proposition.

7. Union counsel argued the wording of section 131 (2) is key as it says the employers are bound as if the agreement was made by them. Union counsel says this prevents the Board from finding that certain terms of the collective agreement do not bind Elirpa. Counsel observes that one of the reasons for the whole scheme is to avoid whipsawing tactics in dealing with employers who are competitors. They all get the same deal, members or not, in counsel's submission. This is the purpose of section 133 which prohibits individual bargaining. If Elirpa does not feel that the Association is representing it properly it can apply under section 134.

8. Further, counsel says that the cross-over clause makes good labour relations sense because it is very hard in some circumstances to distinguish road building from sewer and watermain work, which are very often done together. Since the union represents people doing both kinds of work, it is sensible to avoid disputes over which it is, which the cross-over clause achieves. As well, argues the union, it makes sense for employers because they do not have to spend the time to distinguish whether it is roads or sewer work and they do not have to maintain two crews. Counsel referred to *Frank Plastina Investments Limited*, [1986] OLRB Rep June 720, and *CDC Contracting*, [1982] OLRB Rep. Nov. 1589, as Board cases which indicate the importance of cross-over clauses in the construction industry.

9. Employer counsel, by contrast, underlines the very specific scope of the bargaining rights given to the Association. The company's position is that whatever the Association may be able to negotiate on behalf of its members, when it comes to those parties who are bound by operation of law, the bargaining unit description sets the limits of their jurisdiction. All the Association got was the right to negotiate for a sector and a geographic area; all the other rights still belong to the individual employer. There is simply no mechanism, says counsel, by which the Association can expand on the limited authority it has.

10. Employer counsel refers to *Beckett Elevator Company Limited*, [1982] OLRB Rep. Sept. 1244 to argue that a party can not bargain more authority than the statute gives. The employer refers to section 128(2) which defines the unit of employers as employers within a sector. The whole scheme has to be read subject to the particular geographic area and sector for which the

rights are granted in the first place, argues employer counsel. Counsel for Elirpa urges the ICI model; a party may become bound to the provincial agreement in the ICI sector, but not in other sectors.

11. Counsel for Elirpa submits that problems are created in coherently applying the scheme if the union is right that unlimited bargaining rights flow with an accreditation order. He turns to section 133 which prohibits individual bargaining, and queries how that fits with unlimited scope for bargaining in the Association. Counsel asks if 133(1) means that the employer is prohibited from negotiating what he pays for road building or TTC work. Or what about 133(2)? Counsel asks if this means Elirpa cannot work on roads if there is a strike in the sewers and watermain sector.

12. Employer counsel says that the Association has two roles; one as a statutorily accredited agency, and the other as a consensual association of its members. It bargained this collective agreement in both roles. Employer counsel says that the Association can do whatever it wants on behalf of its own members. However, because accreditation is an extraordinary mechanism which takes away bargaining rights that belong to the employer, but only in a specific sector, it should be very strictly and narrowly construed for non-members. Counsel argues that when operating within the sewers and watermain sector, the Association is acting as accredited employer, but outside that sector, it is not and can only act on behalf of members.

13. Employer counsel cites *Sandercock Construction*, [1984] OLRB Rep. April 653 for the proposition that the Association has no right to affect what Elirpa has to pay for road building. In answering the union's criticism that what the company is proposing would lead to separate deals for members and non-members, counsel says the only way to prevent this would be to have accreditation across several sectors.

14. In reply, counsel for the union says that there is a problem with the clear boundaries theme in the employer's argument. It breaks down completely the moment he says that the Association can do this kind of bargaining for its members. The union says its point is that to the extent that the scheme needs clean lines, the clean lines should be that there are no special provisions for members as opposed to non-members.

15. Union counsel rejects the employer's characterization of the accreditation scheme as extraordinary, saying it is no more extraordinary than certification. The scope of the unit in both situations is an administrative convenience. Counsel submits there is nothing in the accreditation provisions whatsoever that limits the authority of the Association in the manner suggested by the employer.

16. Counsel distinguishes *Beckett Elevator*, cited above, by saying that the Board focused on the words of what is now section 145(a) "but only", which applies to provincial designations in the ICI sector whereas there is no similar limiting language in section 130 applicable to accreditation in other sectors.

17. Responding to employer counsel's concerns about the coherent application of the scheme, union counsel says that if there is no accreditation in roads, jurisdictional conflict may be caused, but the parties are not thrown into involuntary breach. Section 133(2) does not necessarily mean that the employer cannot do road work during a strike in the sewers and watermain sector because of the operation of 15.5.

18. The submissions of the Metropolitan Toronto Sewer and Watermain Contractors Association adopted and supported the submissions of the trade union. It was the Association's submission that Elirpa was bound to the collective agreement between the union and the Metropolitan

Toronto Road Builders Association by virtue of the cross-over clause set out above. In the Association's submissions, Elirpa is bound to the road building agreement for roads work, and that all work on the projects in dispute pertaining to storm sewers, sanitary sewers, watermain and related appurtenances continues to be covered by the Association's accreditation order and the sewer and watermain collective agreement with the applicant trade union.

19. In response to the Association's submission, counsel for Elirpa wrote to say that, if binding, the only result of a cross-over clause should be to incorporate by reference the pay and conditions of the road builders agreement into the sewer and watermain agreement, rather than bind the employer as a party to that agreement. Counsel referred to *Sandercock Construction*, cited above, for that proposition.

20. The most relevant of the statutory provisions referred to in argument are as follows:

127. Where a trade union or council of trade unions has been certified or has been granted voluntary recognition as the bargaining agent for a unit of employees of more than one employer in the construction industry or where a trade union or council of trade unions has entered into collective agreements with more than one employer covering a unit of employees in the construction industry, *an employers' organization may apply to the Board to be accredited as the bargaining agent for all employers in a particular sector of the industry and in the geographic area described in the said certificates, voluntary recognition documents or collective agreements, as the case may be.*

128.-(1) Upon an application for accreditation, the Board shall determine the unit of employers that is appropriate for collective bargaining *in a particular geographic area and sector*, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.

(2) The unit of employers shall comprise all employers as defined in section 119 in the geographic area and sector determined by the Board to be appropriate.

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129.-(2) If the Board is satisfied,

- (a) that a majority of the employers in clause (1)(a) is represented by the employers' organization; and
- (b) that such majority of employers employed a majority of the employees in clause (1)(c),

the Board, subject to subsection (3), shall accredit the employers' organization *as the bargaining agent of the employers in the unit of employers* and for the other employers for whose employees the trade union or council of trade unions may, after the date of the making of the application, obtain bargaining rights through certification or voluntary recognition *in the appropriate geographic area and sector.*

• • •

130.-(1) Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply with necessary modifications to the accredited employers' organization.

(2) Upon accreditation, any collective agreement in operation between the trade union or council of trade unions and any employer in clause 129 (1) (a) is binding on the parties thereto only for the remainder of the term of operation of the agreement, regardless of any provision therein respecting its renewal.

(3) When any collective agreement mentioned in subsection (2) ceases to operate, the employer

shall thereupon be bound by any collective agreement then in existence between the trade union or council of trade unions and the accredited employers' organization or subsequently entered into by the said parties.

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131.-(2) *A collective agreement between an accredited employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the accredited employers' organization and the trade union or council of trade unions, as the case may be, and upon each employer in the unit of employers represented by the accredited employers' organization at the time the agreement was entered into and upon the other employers that may subsequently be bound by the said agreement, as if it was made between each of the employers and the trade union or council of trade unions and, if any such employer ceases to be represented by the accredited employers' organization during the term of operation of the agreement, the employer shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.*

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133.-(1) No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers' organization and no such employer or person acting on behalf of such employer, trade union or council of trade unions shall, so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers, bargain with each other with respect to such employees or enter into a collective agreement designed or intended to be binding upon such employees and if any such agreement is entered into it is void.

(2) No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers' organization and no such employer or person acting on behalf of the employer, trade union or council of trade unions shall, so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers, enter into any agreement or understanding, oral or written, that provides for the supply of employees during a legal strike or lock-out, and if any such agreement or understanding is entered into it is void and no such trade union or council of trade unions or person shall supply such employees to the employer.

(2.1) Subsection (2) does not apply with respect to an agreement permitted under section 73.2 (use of replacement workers).

(3) Subject to sections 73.1 and 73.2, an employer who is represented by an accredited employers' organization may continue or attempt to continue the employer's operations during a strike or lock-out involving employees of employers represented by the accredited employers' organization.

134. An accredited employers' organization, so long as it continues to be entitled to represent employers in a unit of employers, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the unit, whether members of the accredited employers' organization or not.

• • •

145. Where an employer bargaining agency has been designated under section 141 or accredited under section 143 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, *but only* for the purpose of conducting bargaining and concluding a provincial agreement.

• • •

[emphasis added]

21. As the able arguments of counsel demonstrate, the statute lends some support to both sides of the question before us. Having weighed the submissions carefully, the Board is of the view that the employer's interpretation of the statutory provisions is the preferable one. We have considered the accreditation scheme as a whole and its place within the construction industry provisions of the Act. It is clear that the legislature intended accreditation orders to be attached to a sector and geographical area, in the interest of more orderly collective bargaining where statutory conditions are met. It is analogous, but not identical, to the scheme in the ICI sector which forms the basis for provincial bargaining in that sector. In considering that scheme, the Board has consistently held that the sectoral lines drawn in the statute govern, unless bargaining rights outside those sectoral lines have been assigned or given by some other means. The Board has made this point in a number of fact situations. See *Beckett Elevator*, cited above, where the Board found the bargaining rights which flow from the statute did not bring with them, to non-members, the consensual internal grievance process of members. In *London Sand-blasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322, where the Board found that an employer *was* a member of an organization bargaining consensually beyond the statute's sectoral designation, it was bound. Where an employer had not become a member or otherwise assigned its bargaining rights to an association, as in *Fred Jantz Masonry Construction Company Limited*, [1981] OLRB Rep. Sept. 1229, it was only bound to the extent of the statute's compulsion.

22. We have carefully considered whether the difference in statutory language between the ICI scheme and the accreditation sections applicable to other sectors warrants a different approach. It is true that section 145(a), applicable to the ICI scheme, is clearer in its limiting effect because of the inclusion of the words "but only" which do not appear in the accreditation sections. Nonetheless, sections 127 to 134 read as a whole make it clear that the imposition of rights by law was intended to relate to the sector and geographic area set out in the accreditation order. The wording of section 131(2) which makes the collective agreement entered into by the Association binding upon the employer as if it had entered into it itself is also qualified by the wording "subject to and for the purposes of this Act". We are persuaded that the purpose of the Act in the accreditation sections was to impose a scheme based on sectoral bargaining, and that it did not contemplate the imposition by operation of law of rights beyond the sectors set out. The practical implication is that, as a non-member, Elirpa is not bound by the agreement made by the Association for other than the geographic area and sector for which it was accredited. Accordingly, it is our finding that Article 15.5 of the sewer and watermain collective agreement is not applicable to Elirpa in the road building sector.

23. The parties are directed to advise the Board whether there remain any matters needing determination. If so, they will be listed for hearing.

DECISION OF BOARD MEMBER G. MCMENEMY; July 29, 1994

1. I respectfully dissent from the majority decision.

2. As illustrated in paragraph 21 of the majority decision, the statute lends some support to both sides of the question, and I favour the case put forth by the applicant as the side with the stronger set of facts.

3. The question to be answered concerning Article 15.5 (the cross over clause) is not a question of the union obtaining bargaining rights or a collective agreement in another sector, it is a question of making this part of the construction industry compete on a level playing field.

4. The applicant makes no claim that Article 15.5 gives them bargaining rights (or a collec-

tive agreement) for the road sector, their claim is that Article 15.5 dictates what Elirpa or any other contractor will pay their employees when they do road work in Board Area 8.

5. The submissions received from the Sewer & Watermain Contractors Association states that Article 15.5 binds Elirpa to the Road Builders Agreement, which I, supported by a letter from counsel for the responding party (dated May 12, 1994), do not agree with. As stated earlier, this is not a question of bargaining rights and collective agreements, it is a question of labour relations stability.

6. The letter from counsel for the responding party dated May 12, 1994 goes on to state that the effect of Article 15.5 is that if it applies to a party it does not bind a party to an agreement (Road Builders Agreement in this case), but rather to require it to pay wage rates and apply this condition of the referred to agreement pursuant to its obligations under the watermain agreement. That alternative argument put forth by the responding party is the correct argument in this case, in my opinion.

7. To illustrate this argument, counsel directs the Board to the case of *Sandercock Construction 1976 Limited*, (1984) O.L.R.B. Rep. April 653 paragraph 9 and 10 for support of this position.

8. As stated earlier, this case is a case dealing with labour relations stability in a very competitive sector of the construction industry, and not the acquiring of bargaining rights and binding a party to a collective agreement. As such, I would have found Elirpa to be bound to the cross over clause (Article 15.5) of the collective agreement, in respect of rates of pay and conditions of work, when performing work in the road building industry.

0438-94-R FPC Flexible Packaging Corporation, Applicant v. Graphic Communications International Union, Local N-1 and Graphic Communications International Union, Local 500M, Responding Parties

Bargaining Unit - Combination of Bargaining Units - Employer's employees in separate bargaining units represented by separate locals of same trade union - Board dismissing application to combine bargaining units

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*

DECISION OF THE BOARD; July 26, 1994

1. This is an application for a combination of bargaining units pursuant to section 7 of the *Labour Relations Act*, filed by the employer in this matter, FPC Flexible Packaging Corporation ("FPC"), with respect to two units of employees at its plant in Scarborough, Ontario. These bargaining units are represented by two local unions affiliated with the same international trade union: Graphic Communications International Union, Local N-1 ("Local N-1") and Graphic Communications International Union, Local 500M ("Local 500M").

2. Responses to the application were filed by Local N-1 and Local 500M on May 26 and 27, 1994, respectively. Both responding parties have taken the position that the application does

not fall within the ambit of section 7, as the employees in the bargaining units sought to be combined are not represented by the same trade union. For the same reason, Local 500M has asked that the Board dismiss the application without a hearing pursuant to Rule 24 of the Board's rules of procedure.

3. By endorsement dated May 31, 1994, the Board noted that it was not apparent that an oral hearing was required in order to deal with the issue raised by the responding parties, and directed the applicant to provide written submissions on that issue by June 14, 1994. The Board stated that upon receipt of these submissions the Board would either direct an oral hearing or decide the matter on the basis of the written material.

4. Having reviewed the submissions of all parties, we are of the view that this matter should be dismissed without a hearing pursuant to Rule 24, as the application does not make out a case for the order for combination requested, even if all of the facts stated by the applicant in the application and in their written submissions dated June 13, 1994 are assumed to be true.

5. Section 7(1) of the Act provides that:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit *if the employees in each of the bargaining units are represented by the same trade union.* (emphasis added)

6. In this case, the employees in the two bargaining units at FPC which are the subject of the application for combination are represented by two separate local unions, Local N-1 and Local 500M. The employer acknowledges in its submissions that two units have existed for many years, and have entered into separate collective agreements with different terms. However, it asserts that in April 1993, just prior to the company declaring bankruptcy and being purchased by a new group of investors, FPC approached both local unions to attempt to negotiate certain concessions. An agreement was reached between FPC and the two local unions which provided that one collective agreement would replace the previous two for a three year period from March 16, 1993, the expiry date of the agreement with Local 500M (the Local N-1 agreement was to expire March 16, 1994). In addition, the three parties agreed to certain wage and benefit concessions, and changes to previously negotiated provisions of the two agreements, for the three year term. The new agreement was to contain separate addendums for the two unions, but the parties agreed to seek to negotiate common language where possible within the first year of the agreement.

7. The conclusion the employer asks us to draw from this agreement is that the two local unions have agreed that FPC "must..operate its business as if it was dealing with one trade union and one Collective Agreement". That may well be the case, but it does not constitute even an allegation that the two local unions have merged or in some way transferred or waived their separate bargaining rights with respect to the two units. The facts as alleged by the applicant, therefore, do not establish that there is now a single trade union representing the employees in the two units.

8. FPC also states in its submissions that a hearing must be held in order to require the two local unions to prove their separate status. This Board has for many years considered local trade unions as separate entities entitled to trade union status under the Act (see for example *American Standard Products (Canada) Ltd.*, [1965] OLRB Rep. Feb. 590). In this case, both Local N-1 and Local 500M have been previously recognized by this Board as trade unions within the meaning of section 1(1) of the Act. In accordance with the Board's usual practice, then, it is unnecessary for the two unions to prove their status at a hearing.

9. Given this Board's prior recognition of the two local unions as trade unions, and the

undisputed fact that they have bargained for many years as separate entities representing two separate groups of employees covered by different collective agreements, we have no difficulty in determining that the employees of the employer in the two bargaining units which are sought to be combined are *not* represented by the same trade union. As such, section 7(1) of the Act cannot be applied to seek a combination of these units. The application is dismissed.

4408-93-JD Sheet Metal Workers' International Association, Local 30, Applicant v. **Groff & Associates Ltd.** and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (UA Local 599), Responding Party

Construction Industry - Jurisdictional Dispute - Sheet Metal Workers' union and Plumbers' union disputing assignment of work in connection with handling and installation of air handling units in Board Area 18 - Employer assigning work exclusively to Plumbers - Sheet Metal Workers asserting that work in dispute should have been done by composite crew of Sheet Metal Workers and Plumbers - Trade agreement favouring claim of Sheet Metal Workers, but prevailing practice in board area not consistent with trade agreement - Sheet Metal Workers having no collective bargaining relationship with employer - Board finding no reason to interfere with employer's assignment of work - Complaint dismissed

BEFORE: *G. T. Surdykowski, Vice-Chair, and Board Members F. B. Reaume and G. McMenemy.*

APPEARANCES: *A. M. Minsky and James Moffat for the applicant; Laurence C. Arnold and Dennis Carter for the responding party.*

DECISION OF THE BOARD; July 28, 1994

1. This is a complaint concerning an assignment of work, in this case, in the construction industry.
2. The work in dispute in this case is:

“the handling and installation of air handling units being completed and/or knock-down package type heating and cooling units consisting of fans, filters, refrigeration, condensing units, and dampers, with heating coils and/or cooling coils assembled therein, whether or not in connection with the duct system, in Board Area 18”.
3. The Sheet Metal Workers' International Association, Local 30 (the “Sheet Metal Workers”) complain that the employer Groff & Associates Ltd. (“Groff”) should have assigned some of the work in dispute to its members rather than exclusively to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (the “UA”). More specifically, the Sheet Metal Workers assert that the work in dispute should have been done by a composite crew of Sheet Metal Workers and UA members.
4. Pursuant to section 93 of the *Labour Relations Act*, a consultation (which is not a “hear-

ing" as such) was held in this matter on July 7, 1994. Both trade unions appeared at the consultation. The employer Groff did not.

5. Having regard to the materials filed, and the representations of the two trade unions at the consultation, the Board finds it unnecessary to hear evidence or otherwise conduct a formal hearing with respect to this complaint.

6. The work in dispute is in the industrial, commercial and institutional sector of the construction industry. It was performed in the course of the construction of the O.P.P. General Headquarters in Orillia in Board Area 18. The work in dispute was assigned to and performed exclusively by members of the UA. The Sheet Metal Workers submits that the work in dispute should have been assigned to a composite crew consisting of an equal number of *members* of the Sheet Metal Workers and members of the Plumbers, or, in the alternative, that Groff should have subcontracted the work in a manner such that it was performed on this composite crew basis, and it seeks a declaration and order to that effect.

7. Groff is a mechanical contractor which is bound to the UA's provincial collective agreement in the industrial, commercial and institutional sector of the construction industry. Groff has no collective bargaining relationship with the Sheet Metal Workers.

8. There is an "Interim National Agreement" dated August 31, 1956, between the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, and the Sheet Metal Workers' International Association. Among other things, this trade agreement provides that:

...

(2) The installation of completed and/or knock-down package type heating and cooling units consisting of fans, filters, refrigeration condensing units, and dampers, with heating coils and/or cooling coils assembled therein, whether or not in connection with a duct system, shall be unloaded and installed by a composite crew consisting of an equal number of members of the Sheet Metal Workers International Association and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, with the understanding that the members of the Sheet Metal Workers International Association shall install any duct work in connection with the unit and members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry shall install all piping in connection with the units.

9. The trade unions supplied materials with respect to the employer and area practice upon which they each rely.

10. The UA also asserted that economy and efficiency justified the assignment of the work in dispute to its members.

11. In complaints concerning work assignments, the Board generally considers the factors first discussed almost thirty years ago in *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195:

- collective bargaining relationships
- trade agreements between the competing parties
- area practice
- employer practice
- safety, skill and training
- economy and efficiency

(More recently, see *Acco Canadian Material Handling*, [1992] OLRB Rep. May 537; *Electrical*

Power Systems Construction Association, [1992] OLRB Rep. Aug. 915; *Vic West Steel*, [1993] OLRB Rep. Mar. 256.)

12. The Board's jurisdictional dispute jurisprudence demonstrates that this is not an exhaustive list of factors. It is neither possible to make an exhaustive list, nor appropriate to mechanically apply some formula or list of factors to a jurisdictional dispute complaint. Accordingly, in every case, the Board considers those factors which it considers relevant to the particular jurisdictional dispute before it, which may include some or all of those factors listed above, or others which are not. Some of the six factors listed above will be of little assistance in any given case. For example, in recent years, the jurisdictions asserted by construction trade unions in their various collective agreements (as in their constitutions) have become so broad that they are of little assistance, particularly in cases where the employer which made the disputed work assignment is bound to collective agreements with all of the competing trade unions. Because of the historical development of the division of work in the construction industry on a craft or trade basis, and the ever increasing overlap between the construction trades and the work jurisdictions which they assert, the Board has recognized that collective bargaining relationships cannot, *by themselves*, be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no applicable collective agreement with the employer which assign the work in dispute is likely to have a difficult time in having the assignment altered, a trade union which has a collective agreement with the assigning employer will not necessarily be successful in fending off a claim for work by a trade union which has no collective agreement with that employer (*Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143; *Pigott Construction Limited*, [1992] OLRB Rep. June 748 ("Pigott #2")), so long as the issue is one of work jurisdiction and not one of representation (*Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352). On the other hand, a single factor may be determinative of the jurisdictional dispute complaint. Work jurisdiction trade agreements provide one example of a factor to which the Board has given great weight especially in recent cases (*Pigott #2*, *supra*; *Ellis-Don Limited*, [1993] OLRB Rep. Nov. 1130; the various decisions in *Kora Mechanical Inc.*, [1992] OLRB Rep. June 740; and March 3, 1993; April 26, 1993; June 14, 1993; July 12, 1993; Nov. 8, 1993, all unreported). Similarly, although the Board has determined jurisdictional dispute complaints in favour of a trade union which area practice did not favour (*Simcoe Mechanical Contracting Ltd.*, *supra*; *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185), area practice has more and more often been a determining factor (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775; *Acco Canadian Material Handling*, *supra*). Indeed, the Board has said that:

"It is the rare and unusual complaint in which the Board does not attach significant and primary weight to area and employer past practice", and that "the real crux of most jurisdictional disputes revolves around the two past practice criteria."

(*Electrical Power Systems Construction Association*, [1993] OLRB Rep. Nov. 1130).

The emphasis on past practice is reflected in the time and energy devoted to the practice factors in jurisdictional dispute proceedings before the Board.

13. In this case, it is common ground that safety, skill and training favour neither the Sheet Metal Workers nor the UA. The Board is not persuaded that economy and efficiency favour either trade union. This leaves the trade agreement, upon which the Sheet Metal Workers place great reliance, the collective bargaining relationships, which the UA stresses, and area and employer practice, to which both trade unions point.

14. In *Kora Mechanical Inc.*, *supra*, a different provision in the same trade agreement before the Board in this case was considered and given great weight. Of particular interest is the

Board's reconsideration decision dated November 8, 1993 where, at paragraphs 4, 9, 10 and 11 the Board wrote as follows:

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4. The Board accepted the parties' agreement to proceed first by inquiring into and determining the applicability and interpretation of the INA relative to the work in dispute in each complaint and, based on the result of that inquiry and determination, determine what effect was to be accorded to the INA in the adjudication of the complaints. To that end, the Board heard the parties' evidence about the work in dispute in each complaint and the relationship of the INA to the work, and received their written submissions on the conclusions to be reached on that evidence. The Board considered their evidence and submissions and decided that the work in dispute in each complaint could be described generically as "[T]he handling and installation of enclosures, together with their essential accessories, for finned tube convectors. The enclosures extend from wall to wall and pilaster to pilaster". The Board, however, declined to determine the correct assignment of that work on the basis of the INA without hearing evidence on other criteria, such as area past practice, employer past practice, economy and efficiency and employer preference, usually considered by the Board when deciding work assignment disputes. This was in part because of some evidence which suggested that, with respect to the five employers, the Sheet Metal Workers' Association might have only recently sought to rely on the INA to assert their claim to exclusive jurisdiction over the work in dispute. In these circumstances, the Board also deferred giving at that time its interpretation of the INA. (For ease of reference, the Board will refer to that decision as "Decision No. 1" and its decision which issued June 14, 1993 as "Decision No. 2".) After hearing further submissions from the parties on whether the complaints should proceed individually or "*en bloc*", the Board ruled that they would be heard together.

• • •

9. Finally, with respect to the applicants' claim that Decision No. 2 revives an unused INA and will have a disrupting effect on established and appropriate practices respecting assignment of the work in dispute. The material before the Board relating to past practice in each of the three Board areas reveals a variable practice amongst the employers bound to collective agreements with both the U.A. and the Sheet Metal Workers. In Board area #8, the dominant practice has been to assign the work in dispute to U.A. Local 46, although a relatively significant amount of work has been assigned to the Sheet Metal Workers Local 30 or on some sort of composite crew basis to both trade. In Board area #11, the assignment practice has favoured assignment to a crew composed of members of U.A. Local 463 and Sheet Metal Workers Local 392, while in Board area #12, it has favoured U.A. Local 463, although there has been some practice of assigning it to a crew composed of its members and those of Local 269.

10. It is not unusual in work assignment complaints to find variable past practice within a Board area. It is less surprising in these complaints because, in each of them, the two trade unions have relied on the INA to claim assignment of work in dispute to their members on the basis that the INA grants them trade jurisdiction over the work. Clearly, both trade union parties to each complaint have acknowledged that the INA covers the work in dispute, but they differ as to which trade gains jurisdiction from its application. Some of the material before the Board shows that difference to have been a significant factor in work assignment disputes between the two trades in Board area #8 in recent years. The significant number of assignments to composite crews in Board areas #8 and #11, and to a lesser extent in Board area #12, relative to the number of exclusive assignments to either a U.A. or Sheet Metal Workers local, also points to the existence of the same dispute at other times in the three Board areas. In the Board's experience, while there might be a number of reasons why composite crews might be used to perform particular work, one of the most common ones is to avoid or resolve work jurisdiction disputes, particularly when the disputing trade unions are bound to a trade agreement and disagree about its interpretation and application to the work.

11. While work assignment past practice is often a significant factor in deciding the correct assignment in work assignment complaints under the Act, it is most useful when the evidence reveals that the practice has developed in circumstances where the disputing trades have been

aware that the work was being performed and had the opportunity to challenge its assignment. The Board does not have that kind of evidence in these complaints. In these circumstances, therefore, when the Board was weighing the significance of past practice and the other factors, including the INA, in deciding the correct assignment of the work, it should not be surprising that the Board would give significant weight to the INA when the disputing trade unions, even though they disagreed on its interpretation, have relied on it themselves to claim the work for their respective trades. The Board interpreted it in Decision #2 to give jurisdiction over the work in dispute in these complaints to the Sheet Metal Workers. It believed then, as it does now, that its interpretation is correct and points to the correct assignment of the work in dispute in each complaint as being to the Sheet Metal Workers local which is a party to the complaint.

15. In this case, the Board is also satisfied that the Interim National Agreement is a trade agreement binding on the Sheet Metal Workers and the UA, and that it covers the work in dispute. However, the UA argues that the trade agreement applies only where both trade unions have an applicable collective agreement with the employer, and that

where only one of the two trade unions has such a collective agreement, its members should be assigned the work exclusively, particularly where, as the UA asserts is the case here, area and employer practice in the area also favour such an assignment.

16. Section 93(1) of the *Labour Relations Act* provides that:

93.- (1) This section applies when the Board receives a complaint,

- (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another; or
- (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another.

It contemplates that persons who are members of no trade union, non-construction trade unions, and non-craft construction trade unions, as well as craft construction trade unions, may be involved in a jurisdictional dispute. Nothing in section 93 or elsewhere in the *Labour Relations Act* is intended to divide construction industry work among building trades construction unions. The purpose of section 93 has always been to provide a mechanism for resolving disputes over work jurisdiction without the disruption caused by the parties engaging in economic conflict (*Toronto Star*, [1979] OLRB Rep. Aug. 811), and which can deal with all of the competing interests in a single forum, something to which no other provision in the Act is suited (*Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247; *Harold R. Stark Co. Ltd.*, [1982] OLRB Feb. 222 and April 576). The jurisdictional dispute provisions of the *Labour Relations Act* have never been intended to deal with representation issues as such, and a jurisdictional dispute complaint is not a process through which a trade union can obtain representation rights. There is nothing in the amendments which came into effect on January 1, 1993 which altered that.

16. Consequently, where one of the trade union parties does not have an applicable collective agreement, a trade agreement will not necessarily, by itself, result in award of work which it covers to the beneficiary trade union under that trade agreement, even in a contest with another trade union party to that trade agreement. The Board generally gives significant weight to jurisdiction arrangements between trade unions, subject to there being a good reason for not applying what appears to be an otherwise applicable trade agreement. For example, a dominant contrary area or employer practice in the appropriate geographic area may cause the Board to give less weight to a trade agreement. Nor will a trade agreement necessarily carry the day where the issue is one of representation, or one of both representation and trade jurisdiction.

17. In this case, for example, what if Groff had assigned the work in dispute to a composite crew consisting of an equal number of non-union sheet metal workers and members of the UA? Even the Sheet Metal Workers conceded that, on the basis of decisions like *Simcoe Mechanical*, *supra*, that scenario would raise a pure representation issue and it would have no real jurisdictional dispute complaint. What makes the situation different now? Even if the Board concluded that the work in dispute in this case should have been done by a composite crew of Sheet Metal Workers and Plumbers, on what basis would the Board declare that the Sheet Metal Worker trade component of the work should have been assigned to *members* of the Sheet Metal Workers' union, since there was nothing to oblige the employer to do so? Further, on what basis would the Board order, either with respect to the project in issue or in future projects, that Groff assign any sheet metal worker trade component of the work in dispute to *members* of the Sheet Metal Workers' Union rather than to any sheet metal worker tradesmen Groff chose, whether members of the Sheet Metal Workers Union or not? And why and what basis would the Board make that kind of order?

18. As its name suggests there was a predecessor to *Pigott #2*; namely, *Pigott #1* (*Pigott Construction Limited*, [1990] OLRB Rep. April 441). Paragraphs 27 to 41 of *Pigott #1* read as follows:

...

27. The fact that Pigott is bound together with the Carpenters and the Labourers to collective agreements which are the products of a collective bargaining relationship enforceable by statute and has no similar collective bargaining obligation to the complainants, *raises a rebuttable presumption* in favour of upholding Pigott's assignment to its carpenters and construction labourers who are members of the Carpenters and the Labourers. Pigott's collective agreements with the Carpenters and the Labourers give them exclusive bargaining rights for Pigott's carpenters and construction labourers and impose a legal obligation on Pigott to recognize those rights. That obligation would require Pigott to recognize, at the very least, that the Carpenters has some claim to the work listed in Schedule "A" of the carpenters provincial agreement and that the work listed arguably includes the work in dispute herein. While the claim in Schedule "A" does not express any better claim than that described in the complainants' collective agreements, the claim in Schedule "A" has the strength of being founded in collective bargaining rights. The labourers provincial agreement does not express an independent claim to the work in dispute. Pigott's obligation to the Labourers under clause 2.06 of that agreement is to assign to members of the Labourers the work of "tending carpenters". Therefore, if Pigott assigns the work in dispute to the Carpenters, it must also assign to the Labourers the associated "handling and conveying of materials". While the Labourers' claim is dependent upon the Carpenters' claim, it too has the strength of being founded in its collective bargaining rights for Pigott's construction labourers.

28. Pigott has no comparable obligation to the IBEW and the UA. How, then, can those unions legitimately claim that Pigott was obliged to assign the work in dispute to IBEW electricians and UA plumbers? If there is an answer to that question that is favourable to the complainants, it is to be found in the construction industry context in which the dispute arises.

29. The work in dispute is in the industrial, commercial and institutional ("ICI") sector of the construction industry in Metropolitan Toronto and nearby municipalities, as were all 17 hospital construction projects in evidence herein. The unionized part of the ICI sector of the construction industry in Ontario has been subject to the province-wide bargaining scheme of the Act since 1978. Pigott, the Carpenters, the Labourers, the IBEW and the UA are parties to whom the province-wide bargaining scheme applies. The collective agreements binding upon Pigott, the Carpenters and the Labourers are products of bargaining under that scheme. While the IBEW and the UA are not bound to collective agreements binding on Pigott, they are bound to the electricians provincial agreement and the plumbers provincial agreement together with electrical and mechanical contractors for whose electricians and plumbers the IBEW and the UA hold bargaining rights in the ICI sector. When Pigott and the other general contractors on 16 of the 17 hospital construction projects in evidence decided to subcontract the work which included the installing of the patient service modules, they subcontracted the work to electrical or

mechanical contractors bound to the electricians and plumbers provincial agreements. As a result of those subcontracts, the patient service modules were installed by IBEW electricians and UA plumbers under their respective provincial agreements. Where the patient service modules were to house both electrical and medical gas services, they were installed by crews composed of equal numbers of IBEW electricians and UA plumbers, except on Pigott's Scarborough Centenary Hospital project where they were installed by IBEW electricians. Pigott was not obliged, and there is no evidence the general contractors on the other hospital projects were obliged, once having decided to perform the work, to let it to a subcontractor who would have the work performed by persons belonging to those two unions. The Carpenters union was aware of those subcontracts and the resulting work assignments to IBEW electricians and UA plumbers, but did not contest any of them. So, whatever claim to the work in dispute the Carpenters union has under Schedule "A" and clause 19.01 of its provincial agreement or the collective agreements which were in force prior to province-wide bargaining in 1978, it did not rely on those provisions to claim the work by way of grievances or work assignment complaints.

30. Having work performed by way of subcontract to trade contractors like the electrical and mechanical contractors on the hospital projects, is fairly typical of building construction in the unionized part of the ICI sector of the industry. That practice results largely from the historical development of a division of labour in the construction industry based on the principle of operational specialization, particularly in the United States and Canada.

31. The effect of the division of labour by trade or craft is clearly visible in the international unions which represent construction tradesmen in Canada and the United States. Approximately 20 of these unions joined together to form the Building and Construction Trades Department of the AFL-CIO. They are known as the building trades unions. Some 13 of these building trades unions have a presence in construction in Ontario. They also are the unions who hold the exclusive bargaining rights for their trades under the province-wide bargaining scheme in the ICI sector. Historically each building trades union has sought to organize all of the employees in its trade rather than all of the employees of an employer, as in the industrial union model. Each claims to itself exclusive jurisdiction in the construction industry for its trade and the work performed by the trade. That is one means by which each of these unions seeks to assure that its members will retain a share of the available work in the industry. These are institutional claims and, while the building trades unions will seek to enforce their claims through protective provisions in their collective agreements, they have used whatever lawful means which they thought would be effective in the particular circumstances. A classic work jurisdiction dispute results when a union perceives "its work" being done by persons other than its members and seeks to change that circumstance by demanding that it be done by its members. Where, as here, it occurs in the unionized ICI sector of the industry, it is a struggle between two or more of the building trades unions over which union's members will do the work.

32. One of the effects of operational specialization on building construction is visible in the way employers have organized themselves to perform construction work. Typically there are general contractors and trade contractors. A general contractor usually deals directly with the purchaser of construction and takes charge of an entire project. The general contractor may employ bricklayers, carpenters, construction labourers, cement masons (cement finishers), operating engineers and rodmen, but may, and frequently does choose to perform only a limited amount of work with its own employees. Instead it will choose to subcontract packages of work to subcontractors, many of whom will limit the work they take to that which is performed by one or two trades. These are the trade contractors and their specialization is defined by the trades which they employ and, in the unionized part of the industry, by the trade unions representing those trades. In the unionized ICI sector in Ontario, an electrical contractor employing only electricians represented by the IBEW and a mechanical contractor employing only plumbers and steamfitters represented by the UA would be common examples of trade contractors. 16 of the 17 hospital projects in evidence in this proceeding are examples of general contractors subcontracting packages of electrical and mechanical work to electrical and mechanical trade contractors.

33. One of the obvious consequences of such practices is that trade contractors are largely dependent upon general contractors continuing their subcontracting practices. So are the trade unions which represent those trades dependent on the practices continuing for there to be work opportunities for their members, unless, of course, the general contractor employs them directly to do the work. Where, as has happened here, the general contractor assigns work directly to a

trade different from the one which would have performed it had the general contractor subcontracted the work, it poses a difficult dilemma for the trade union whose members lose the work opportunity. For example, in the instant case, the real complaint of the IBEW and the UA is with Pigott (and the Carpenters and the Labourers), but they have no collective agreements with Pigott and, therefore, no grievance and arbitration process available to them. The agreements binding on the IBEW and the UA are with electrical and mechanical contractors who likely share with the two unions their interest in retaining jurisdiction over the work in dispute. When Pigott disagreed with the complainants' claim to the work, they pursued the claim by filing this complaint under section 91 of the Act.

34. Work jurisdiction disputes are a perennial problem for the construction industry. Seen from outside the industry, they appear to be senseless fights between members of the building trades family of unions about which union's members are to get a particular work assignment; or, to put it another way, about which union's members will be employed and which ones will be unemployed. But when such disputes are viewed in the context of the operational specialization prevalent in the construction industry, the claim of jurisdiction over a particular kind of work is but one of several mechanisms relied on by the building trades unions to protect their members' share of the available work. Protecting work jurisdiction claims is an integral part of the union security provisions in construction industry collective agreements. The closed shop hiring hall system and limiting the subcontracting of the claimed work to contractors with whom the union has a collective bargaining relationship complete the protection. This approach to job security might not be acceptable outside of the construction industry, but that is not reason to condemn its use in the industry. Those mechanisms both reflect and attempt to balance the economic and structural forces which operate in the construction industry.

35. This work jurisdiction dispute arises in the context of the unionized part of the ICI sector of the construction industry in Metropolitan Toronto and nearby municipalities. During the 13 years represented by the past practice evidence in this case, unionized contractors have been performing work in the sector and area with employees who are represented in collective bargaining by the building trades unions. Since January 1978, those relationships have been regulated by the province-wide bargaining scheme. Under that scheme, each building trades union can represent only employees in the trade for which it has been designated. It is in this context that the work in dispute has been performed on hospital projects exclusively by trade contractors under subcontract from general contractors, but for the single exception on the Credit Valley Hospital where the general contractor performed it with its own forces, members of the Carpenters. But for that exception, the work has been performed exclusively by IBEW electricians and UA plumbers employed by the trade contractors. That is the overwhelming past practice and clearly it is the product of the various contractor and trade union players in this segment of the construction industry playing out to the fullest extent the operational specialization characteristic of the industry.

36. Pigott previously has not assigned the work to the Carpenters and Labourers. Nor has it employed IBEW electricians or UA plumbers to perform the work. It has subcontracted the work to contractors who in turn have assigned it to IBEW electricians and UA plumbers. To this extent at least, Pigott has contributed to the area past practice of the work being performed exclusively by IBEW electricians and UA plumbers with the single exception of the Credit Valley Hospital project.

37. The letting of the work on the other projects to subcontractors and assignment of the work to the IBEW and the UA, was not contested by the Carpenters and Labourers. Clearly, there has been an acceptance of that subcontracting and of those assignments. With it there has developed a *consistent and long standing practice* of the IBEW and the UA installing patient service modules in hospitals where the modules will contain electrical and medical gas devices. Now, after 13 years of their members installing patient service modules on all but one of the hospital construction projects in Metropolitan Toronto and nearby municipalities, as a result of Pigott's assignment of that work to the Carpenters on St. Joseph's Hospital, the IBEW and the UA see their work being done by members of other trade unions. To them, that is a direct challenge to the stability of what they believe is their established work jurisdiction.

38. If the Carpenters, the Labourers and Pigott are correct and the IBEW and the UA cannot make a successful claim for the work in dispute under section 91 because they lack collective

agreements with Pigott, there may well be no other lawful recourse open for the IBEW and the UA to establish that their consistent and long standing practice of installing patient service modules gives them jurisdiction over that work on hospital construction projects in the unionized sector of the construction industry in Metropolitan Toronto and nearby municipalities. From a practical point of view, they cannot gain jurisdiction by obtaining bargaining rights for Pigott's employees since it does not employ electricians and plumbers and the IBEW and the UA are prohibited by statute from representing any other trades in the ICI sector of the construction industry. If it is intended that the Board's jurisdiction under section 91 be used to fashion remedies which will lessen work assignment disputes in the construction industry, the result argued for by the Carpenters, the Labourers and Pigott would be counter to that objective. Furthermore, the result suggests that the Board would exercise its discretion under subsection 91(1) to refuse to inquire into a complaint if the trade union claiming the work in dispute does not have a collective agreement covering the work with the employer who is or was assigning it and the trade union to which it has been assigned does. From even the small sampling of the Board's jurisprudence on work assignment complaints relied on by the complainants, it would appear that the Board has not taken that approach. It would appear also that unionized employers in the construction industry and the trade unions which represent their employees either have accepted that a trade union can bring a work assignment complaint in those circumstances, or they have not persuaded the Board in any reported decision to refuse to inquire into such work assignment complaints. Thus, to this panel of the Board, it appears that, prior to this complaint, the Board has not ever refused to consider whether any of the *other usual criteria were so compelling as to override the lack of a bargaining relationship* between the union claiming the work and the employer who was assigning it.

39. As noted already, the opposing claims for the work in dispute in this complaint pose the difficult question of whether the Board would direct an assignment which would have the effect of taking work away from persons in the trade union with a collective agreement covering the work, to which the employer who is or was assigning the work is bound, and give it to persons in a trade union which is not bound to a collective agreement with the employer, on the basis of a consistent and long standing practice of that union's members performing that work. The Board has considered it appropriate to set out at some length its views in that regard in deference to the importance of the issue and the attention given to it by the parties. Having done so, however, in the final analysis there is a further element of this complaint which compels the majority of the panel to not decide the question in this case. That element is clause 402 of the electricians provincial agreement. The clause, in the majority's view, makes this complaint a request that the Board direct Pigott to subcontract the work to a third party who will assign the work to a crew composed of equal numbers of IBEW electricians and UA plumbers. This is evident from looking at the effect of directing Pigott to assign the work to such a composite crew. Were the Board to make that direction, Pigott should have the same choices available to it when complying with the direction as it had when it first received its contract from St. Joseph's; that is, to perform the installation of the patient service modules with its own forces or subcontract the work. Should Pigott choose to assign the work to a crew of its own employees composed of equal numbers of IBEW electricians and UA plumbers, it would be unable to do so because of the restrictive hiring practice of the IBEW, one of the joint complainants. Instead, Pigott would have to engage in some form of subcontracting.

40. Thus, while the complainants have jointly asked the Board to direct Pigott to assign the work to a crew composed of equal numbers of IBEW electricians and UA plumbers, *the practical effect of the IBEW's hiring restriction is to make their complaint a request that the Board direct Pigott to subcontract the work to contractors who will assign the work in the requested manner. In these circumstances, the Board is of the view that Pigott's assignment of the work in dispute should not be disturbed.*

41. Accordingly, pursuant to the provisions of subsection 91(1) of the *Labour Relations Act*, the Board directs that Pigott Construction Limited continue to assign to carpenters in the United Brotherhood of Carpenters and Joiners of America, Local 27 and to construction labourers in the Labourers' International Union of North America, Local 506, the transporting from a central storage area to the point of installation and installing patient service modules on the walls of

patient rooms, including the fitting of face panels and final clean-up, on the St. Joseph's Hospital project.

(emphasis added)

In *Pigott #2*, the Board (differently constituted in part than in *Pigott #1*) cited paragraphs 28 to 38 in *Pigott #1* but then went on to conclude that:

...

11. Notwithstanding the above insightful comments, the Board in "*Pigott I*" in the end declined to make the declaration for a combined crew sought by the complainants because one of them at least, the IBEW, had a clause in their collective agreement, which they made clear to the Board they would not waive, and which effectively prevented them from supplying electricians to any contractor "whose business is not recognized as electrical work". That meant that an award by the Board in favour of the complainants was an award requiring *Pigott* to subcontract. The Mechanical Contractors Association of Ontario, as it turns out, some years ago negotiated a similar protection in Article 25 of its provincial agreement with the Plumbers'. However, it is clear from the evidence that the U.A. does have a policy of waiving that restriction, and that such waiver has in fact been expressly recognized in its collective agreement to a degree in 1982, and to a further extent more recently. It is clear, therefore, that *Pigott* has the choice, should an award go in favour of the complainant, of engaging plumbers to do this work either directly, or through a subcontractor as it has on occasion done in the past.

12. For all of the foregoing reasons, we are of the view and declare that the claim asserted here by the complainant, that the work of installing the washroom accessories at the instant hospital in Toronto should have been assigned in accordance with the 1965 work-jurisdiction agreement between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Brotherhood of Carpenters and Joiners of America, is correct and ought to be upheld.

In short, *Pigott #1* was not followed in *Pigott #2*, on the basis of the distinction drawn in paragraph 11 of *Pigott #2*.

19. Whatever *Pigott #2* means, it does not mean that an employer which makes an incorrect assignment of work will necessarily have to assign that work to tradesmen who are members of a particular trade union, or even that it will have to alter the original assignment at all. The Board adjudicates jurisdictional dispute complaints which are brought before it, as between the parties to the particular complaints. The Board is not a labour relations Solomon sitting ever ready to divide up the work jurisdiction pie. However, even though a trade union party to a jurisdictional dispute complaint which has no applicable collective agreement may be unable to persuade the Board to order that work in dispute be assigned to its members, it may be able to persuade the Board to declare that the disputed work belongs to the trade its members practice, or even to order that it be assigned to persons who practice that trade. While this may result in somewhat of an empty victory to a trade union which chooses to bring a jurisdictional complaint in circumstances where it has no collective bargaining relationship with the assigning employer, it would at least give that trade union an opportunity to organize and obtain representation rights for non-union tradesmen through either voluntary recognition or the certification provisions in the *Labour Relations Act*. This is particularly true now that jurisdictional dispute complaints can generally be brought and disposed of quite quickly.

20. Although the lack of a collective bargaining relationship will not necessarily be fatal to a trade union's claim for work, the result in cases like *Pigott #2* should not be taken to suggest either that the collective bargaining relationship factor is unimportant, or that the Board will necessarily direct that work be assigned to members of a craft trade union, even where the Board concludes that some or all of the work in dispute should have been assigned to the craft/trade in which members of that trade union are engaged. On the contrary, a trade union which complains about an

assignment of work but has no collective agreement on which to base its claim, will have to satisfy the Board that there are compelling labour relations reasons to interfere with the employer's assignment.

21. In a jurisdictional dispute between two or more craft construction trade unions, it is appropriate for the Board to look to the trade agreement and the collective bargaining relationship factors for the purpose of determining how the work should be assigned as between the competing trades, and not just for the purpose of determining how the work in dispute should be apportioned between the competing trade unions, all in the context of the other relevant factors. The weight given to a trade agreement will depend on the circumstances, including whether it is a Local or International trade agreement, and how and the extent to which it has been applied with respect to the particular work in dispute in the relevant geographic area.

22. In this case, the provincial collective agreements of the respective trade unions both seem to cover the work in dispute. In other words, the work in dispute is within an overlap between the trade jurisdictions claimed by the Sheet Metal Workers and the UA. However, because the UA has a collective bargaining relationship with Groff and the Sheet Metal Workers does not, the UA's claim to the work in dispute on behalf of its members, rather than vis-a-vis the trade which its members practice, is stronger. That is important because the issue in this case is whether the assignment of the work in dispute should be altered in favour of the Sheet Metal Workers, or at all.

23. The trade agreement binding on the two trade unions favours the claim of the Sheet Metal Workers. However, as we noted above, the weight which the Board will give to a trade agreement in a particular case may very well depend on the degree to which the area an employer practice reflects, or at least does not conflict with, that trade agreement.

24. In that regard, and with great respect to the panel in *Kora Mechanical Inc.*, *supra*, it is not clear how the Board weighed or rationalized the different practices in the different geographic areas in that proceeding. However, the decision in *Kora Mechanical Inc.* should not be taken to suggest that the Board will necessarily attempt to rationalize a variety of practices into one, or that it will give a trade agreement the same weight in every geographic area, although in a particular case it may well make labour relations sense and be appropriate to do so.

25. The nature of the interaction of trade agreements and work assignment practice is such that it may well be that a trade agreement is applied in some areas and not in others. Accordingly, the weight given to a trade agreement in one geographic area may not be the same as the weight given it in another, depending on the degree of conflict between the trade agreement and practice factors. Instead, the weight given to a trade agreement by the Board will reflect the manner in which it has been applied in the geographic area(s) in question. Such an area by area approach to trade agreements maintains the emphasis given by the Board to area practice in recent years. At the same time, because it requires a significant or dominant practice to cause the Board to give less or perhaps no weight to a trade agreement, this approach does nothing to undermine true trade agreements. In short, there is no single trump card.

26. In this case, it is appropriate to look at the practice of Groff and the practice in general in Board Area 18 with respect to assignments of the work in dispute. Taking the Sheet Metal Workers best case in that respect, the materials indicate that, since 1985, the work in dispute has been assigned as follows:

- a) by Groff - 2 to members of the UA and 1 to a composite crew consisting of a significantly greater number of UA members;

- b) by contractors which have a collective bargaining relationship with the Sheet Metal Workers but which the materials did not indicate do or do not have a collective bargaining relationship with the UA - 8 to members of the Sheet Metal Workers and 6 to a composite crew of members from each union;
- c) by contractors which have a collective bargaining relationship with the UA but not with the Sheet Metal Workers - 55 to members of the UA.

In summary, contractors in Board Area 18, including Groff, have assigned the work in dispute 8 times solely to members of the Sheet Metal Workers, 6 times to an equal composite crew, one time to a composite crew consisting mainly of members of the UA, and 57 times solely to members of the UA.

27. Outside of Board Area 18, Groff has assigned the work in dispute solely to members of the UA 17 times and sub-contracted it so that it was done by an equal composite crew of Sheet Metal Workers and UA members (at most) 6 times.

28. In our view, there is a dominant prevailing practice in Board Area 18 which is not consistent with the trade agreement between the two trade unions. In this case, the dominant prevailing practice favours the claim of the UA. So does the dominant, though not invariable, employer practice. Accordingly, and also because of the representation issue which arises because the Sheet Metal Workers has no collective bargaining relationship with Groff, the Board is not prepared to give any great weight to the trade agreement in this case.

29. In the result, the Board is not satisfied that the work in dispute in this case was improperly assigned, or that there is any reason to interfere with that assignment of work. This complaint is therefore dismissed.

0398-94-U Victor Carquez, Applicant v. Canadian Union of Public Employees and its Local 229, Responding Party v. Marriott Management Services, Intervenor

Ratification and Strike Vote - Strike - Unfair Labour Practice - Employee complaining about secrecy of strike vote 8 weeks after the vote and 3 weeks into the strike - Board finding applicant's delay in making application to be significant and without reasonable explanation - Board exercising its discretion against inquiring further into merits of application

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *William Moore* for the applicant; *Nancy Rosenberg*, *Linda Dumbleton*, *John Platt*, *Harold van der Tol* and *Heather Brennan* for the responding party; *David Cowling*, *Jim Fougere* and *Peter Myer* for the intervenor.

DECISION OF THE BOARD; July 7, 1994

1. This is an application made pursuant to the provisions of section 91 of the *Labour Relations Act*, alleging that the Canadian Union of Public Employees and its Local 229 (referred to in this decision as "Local 229" or "the union") has violated section 74(4) of the Act. Section 74(4) provides:

74.-(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

2. By brief written decision dated May 30, 1994, the Board decided on the basis of undue delay in the filing of this application, to exercise its discretion against inquiring into the merits of the matter. The following are our reasons for this determination.
3. At the outset of the hearing, over the objection of the union, the Board granted the employer, Marriott Management Services ("Marriott"), standing to participate in the hearing of these issues. Without determining whether Marriott had a strictly legal interest in the issues before the Board, the panel decided that it might be helpful to have the employer's participation and, in our discretion, granted it standing.
4. The union represents full-time and part-time employees who work in cafeterias servicing Queen's University. It has been engaged in negotiating a renewal agreement for the full-time bargaining unit, and a first collective agreement for the part-time bargaining unit. In a nutshell, the application alleges that the manner in which the union conducted a strike vote with respect to both units was not in compliance with section 74(4). The alleged deficiencies which the applicant identifies as most significant are a failure to provide a private place in which employees could fill out their ballots, and a failure to collect the ballots in a way that made it impossible for anyone to see how others voted. The general manner in which the union conducted the vote was consistent with other strike and ratification votes it has held in the past. In general, the dispute is with respect to whether the procedures applied by the union meet the requirements of section 74(4).
5. In his written materials, the applicant made reference to other sections of the Act, which were not pursued at the hearing or are ancillary to the allegations made under section 74(4).
6. The strike vote was held on March 8, 1994. This complaint was filed with the Board on May 5, 1994. In the intervening period, the union and Marriott continued negotiations towards a collective agreement and reached impasse in their bargaining. On April 11, the full-time bargaining unit commenced a strike and on April 16, the part-time unit commenced a strike. Shortly after the strike began, the school year finished, and most students left the campus.
7. At the commencement of this hearing on May 9, the union raised a preliminary motion. The union asserted that in light of the undue delay in the filing of this application, the Board ought to dismiss the complaint without inquiring into its merits. Further, the union asserted that improper motivation in the filing of this complaint should also lead the Board to dismiss the complaint. The union indicated that it was prepared to lead evidence on both of these issues. The Board found it convenient in all of the circumstances, including the desirability of an expeditious hearing and determination in this application, to direct that the parties lead their evidence and provide their representations on all issues.
8. As we have decided this case on the basis of undue delay, it is unnecessary for us to detail the evidence with respect to the events of the meeting of March 8. For the most part, therefore, the recitation of the facts below refers to events following that meeting. We make the following general comments with respect to the evidence and our findings of fact. The Board heard, on the issues of delay, the testimony of Victor Carquez, John Dennie, Linda Dumbleton (the CUPE National Representative), John Platt (the Local President) and, to a lesser extent, Joe Almeida, Heather Brennan and Clark Craig. In arriving at our findings of fact, we have considered all of the evidence and taken into account such factors as the demeanour of the witnesses, the clarity of their evidence, the witnesses' apparent ability to recall events and to resist the tug of self-interest in their

responses to the questions, and what seems most reasonable and probable in all of the circumstances and having regard to the evidence as a whole. Ultimately, we have found much of the evidence of John Dennie, and portions of the evidence of Victor Carquez, less than compelling and beset by a certain level of improbability, self-interest and exaggeration in its telling. Dennie, in particular, had difficulty keeping his personal history of disputes with the union over various issues from colouring his testimony, and was quick to invoke hearsay and innuendo to suit his purposes. Where there are contradictions between their evidence and the evidence of the other witnesses, including those called by the applicant, we prefer the evidence of the others, and we are inclined in general to give little weight to Dennie's evidence.

9. The applicant testified that he was "in awe" of the procedure by which the strike vote was held on March 8. He states that he had expected a place "where no bias was shown" and a place where he could vote in secrecy. He states that he discussed the matter that night with some other employees, and raised it the next day with a shop steward and member of the bargaining committee, Dan Smith. Carquez did not state how he put his concerns to Smith. He gave no detail as to this conversation, other than to say that Smith's response was that if he discussed it with anyone, he could be suspended or fined, as had John Dennie, another member of the bargaining unit who has been very vocally against the strike. Carquez stated that he did not feel intimidated by this and that, after what happened at the vote, nothing would stop him. Carquez also stated that a few days later he asked Smith for a copy of the union's constitution and by-laws. A few weeks after that, he started a petition with the object of delaying the strike until September. This petition, which is dated March 29, states:

Re: Strike action against Marriott co. (Before September 1994)

The Members signed herein are opposed to any strike action against Marriott co. before the commencement of the new school year.

We the undersigned members do not feel that a strike action would practically be in our best interest at this time.

IN SOLIDARITY THE UNDER SIGNED

10. Carquez also states that he spoke to Clark Craig, the chief steward, about the issue in the middle to end of March, telling Craig about the concerns of a number of people that they felt that they had "no secrecy" during the vote. It was after this that he started his petition above. In addition to his own petition, Carquez also assisted in the circulation of another petition drafted by John Dennie. The evidence is unclear as to when this other petition was drafted. It is dated March 10, but Carquez states that it was done during the week of April 6. The Dennie petition makes reference to a number of objections to the way in which the strike vote was held, including an allegation that some people had the opportunity to view the ballots of other people. This petition was never presented to the union. Carquez testified that Smith saw him circulating it and warned him about it, saying that it was the letter that John Dennie was to be "brought up on charges" about.

11. Carquez and Dennie consulted with a lawyer after the strike began. The opinion that they received, dated April 20, 1994, was submitted into evidence before us. The letter states that the author was asked for an opinion on whether Carquez and Dennie could require the union to hold a new strike vote. It sets out the facts as they were related to the author. Nowhere in this letter is there any mention of a concern that the procedure for holding the vote was in violation of section 74(4) of the Act, or any mention of a concern regarding the secrecy of the ballots. Indeed, the author states that the impetus for a challenge to the strike vote was that Carquez and Dennie

disagreed with the timing of the strike. They felt that when people voted in favour of the strike on March 8, they had been misled into thinking that the strike would begin soon, in the month of March. The letter states that they questioned the wisdom of a strike in April, since school was coming to an end.

12. The by-laws of the union provide for the calling of special meetings upon petition by a member. Carquez used these provisions to arrange a special meeting of the membership on April 26. The agenda of this meeting, which he established was two-fold: to discuss the addition of one member to the negotiating committee, and to discuss the mandate of the negotiating committees.

13. Carquez states that the reason why he delayed in making the present application was that he was attempting to deal with the issue internally. He also states that because others were fearful about raising a challenge to the secrecy of the vote, he used other issues, such as the timing of the strike, as the basis for his activities against the strike.

14. Joe Almeida, who testified for the applicant, actually drafted the petition of March 29. He states that when he voted in favour of the strike, he expected the strike to begin in March. Both he and Carquez were upset about the timing of the strike. He testified that the purpose of the petition was to move the strike to September. This is also the reason he signed Dennie's petition, in early April. At the time he and Carquez circulated the petition of March 29, there was no issue regarding the secrecy of the ballot. It was never a concern of his. He was present when the petition of March 29 was presented to John Platt, the president of the local, by Carquez, and states that the discussion centred around the timing of the strike. He testified that Carquez was completely supportive of the strike, until he found out that it would not start until April. Both he and Carquez were very upset about this.

15. The union's witnesses testified that at no time until at least April 26 did Carquez ever raise a concern with them as to the procedure of the strike vote. These witnesses included the National Representative and Local President both of whom were very active in the union's affairs at this time and attended at numerous union meetings in the months of March and April in connection with negotiations and the strike. They were also known to Carquez. Clark Craig, the Chief Steward, testified that during the first week of the strike, he had a conversation with Carquez in which Carquez asked him if he thought the vote was "legal". Carquez did not elaborate. John Platt confirmed the evidence of Almeida that the discussion he had with Carquez over the March 29 petition was in regards to the timing of the strike. In a conversation on April 26 with Carquez, Carquez raised some concerns about the method of the balloting.

16. Most of the union's witnesses testified about events at the union's meetings in March following the taking of the strike vote. On Monday, March 21, there was an information meeting of the membership following a mediation session. It became clear at that meeting that some members had not known that the timing of the strike was to be determined by the bargaining committee. Some thought that it was an issue that should be put to a vote of all the members. Carquez, in particular, was quite vocal about the issue. He wanted to begin the strike as soon as possible. Carquez made it clear that he thought the union should call the strike by March 24 at the latest.

17. On March 27, there was a meeting of picket captains in preparation for the strike. Carquez had volunteered to be a picket captain. At this meeting, he stated that he was no longer going to be a picket captain. He stated that as the union had gone past his March 24 deadline for calling the strike, he intended to do everything possible to stop the strike. He indicated that he had polled the workers and most of them were against a strike in April, but were prepared to strike in the fall, upon the resumption of school.

18. We find on the evidence that to the extent Carquez was present and aware of the events of March 8, they did not concern him. Only once it became a possible avenue to pursue his real concerns, surrounding the timing of the strike, did he raise an issue concerning the strike vote procedure. If we are to believe Carquez that he was aware right away on the evening of March 8 that there were “irregularities” in the voting procedure, then it is clear that he did not find it to his advantage to raise these irregularities until much later. The evidence shows that Carquez was a vocal and committed supporter of the strike, *until* he found out that it was not going to start until April. He disagreed vehemently with the union’s decision as to the timing of the strike, to the point that he consulted legal counsel and started a petition with a view to compelling the union to defer the strike until the fall.

19. We are satisfied that Carquez did not raise the issue of the secrecy of the strike vote with the union until at least April 26. Even with respect to the conversation of April 26, with John Platt, the evidence is less than clear that the concerns expressed by Carquez related specifically to the *secrecy* of the balloting as distinct from other related issues. We choose not to accept the evidence of Carquez as it relates to discussions with Smith and with Grant as evidence that the union was aware of this impending complaint. Carquez’ evidence as to his discussions with Smith is at odds with the evidence of other witnesses, notably Almeida, Dumbleton, Brennan and Platt, and with his own evidence. Carquez claims that he raised a concern regarding the secrecy of the vote early on. Yet the evidence is clear that he was a very vocal supporter of the strike, and in fact wanted it to start as quickly as possible. Carquez had participated in an information picket, and had even volunteered to be a picket captain. We find it improbable that he would have raised any issue regarding the procedure of the strike vote at this stage.

20. The Board was asked to draw an adverse inference against the union as a result of the failure to call Smith. We decline to draw such an inference in this case, because we have found the evidence of Carquez as to his conversations with Smith, to be lacking in plausibility. For instance, Carquez states that Smith told him that if he discussed the issue with anyone, he could be suspended or fined as had John Dennie, another member of the bargaining unit who had been very vocal against the strike. The evidence establishes that Dennie has been charged with contraventions of the union’s constitution, over incidents which preceded March 8 and have nothing to do with the strike. The evidence also establishes that the charges against Dennie have not been tried, and no suspension or fine has resulted as of the date of these events, or even the hearing before us. Carquez later in his testimony acknowledges this. Further, it makes no sense that Smith characterized Carquez along with Dennie as an opponent of the strike, since on Carquez’s own evidence, he was a strong supporter of the strike at this point, and continued to be until the union failed to call the strike early enough for his liking. It also appears on the evidence that Carquez had made it well-known that he was in support of a strike. Further, Carquez did not provide any details as to the concerns that he raised with Smith, simply stating that he raised “it” (the vote). We therefore do not find the evidence of these conversations to be reliable. It is simply not reasonable to conclude from it that as a result of these conversations with Smith, the union was put on notice that there was a challenge to the manner in which it had carried out the strike vote.

21. In any event, even if it is possible to conclude that Carquez had a conversation with Smith in which he “raised” the vote, the evidence is also clear that Smith was not a member of the executive and had no responsibility for the conduct of votes. Despite ample access to those who did, such as John Platt and Linda Dumbleton, Carquez chose not to bring the issue to them and neither did he ask Smith to. We are not prepared to infer from the circumstances that “notice” to Smith (if it was given) constituted “notice” to the union.

22. As to the evidence of a conversation with Grant, we prefer Grant's evidence as to the timing and content of this discussion.

23. With respect to the petition started by Dennie, the evidence is that this petition never came to the attention of the persons in the union with responsibility with respect to the strike vote. It may be that it came to the attention of Smith early in April, but since it was never presented to the union or made the basis of a request by either Dennie or Carquez to the union to conduct a further vote, we do not infer from Smith's knowledge that the union was put on notice of this impending complaint.

24. Carquez also claims that the issue of the timing of the strike was a device to challenge the vote without having to surface the real issue, the secrecy of the vote. We find this incredible. We find no basis for his contention that the members were afraid to raise the issue regarding the secrecy of the vote, and therefore preferred to "shield" themselves behind the timing issue. We find improbable the contention that there was fear in raising certain issues but not in raising others. We find the letter of April 20 from legal counsel illuminating, for it is clear from that letter that to the extent that Carquez was now seeking legal advice, it was in support of his goal of having the strike deferred until the fall. To the extent there is a complaint made about the strike vote, it is to the effect that employees were misled into thinking that the strike would start much sooner than it did. On Carquez's own evidence, he is very quick to assert his views and not easily intimidated or dissuaded. If the strike vote procedure had been a concern at this point, we see no reason why he would not have sought advice on it.

25. On the evidence as a whole, therefore, we conclude that to the extent that Carquez says he took note of and had concerns about the balloting procedures at the strike vote held on March 8, he chose not to raise any concerns over these until he decided that the union was mishandling the timing of the strike. Alternatively, it is also possible to conclude from the evidence that Carquez did not have any concerns about the voting procedure at the time of the vote, and only when he was searching for a way to force the union to defer the strike did he seize upon this as a method of pursuing that other agenda.

26. We therefore find that the reasons for the delay between March 8 and the filing of this application is attributable, in large part, to a lack of concern by Carquez over pursuing the very issues which are at the heart of his application. We find that only once it became a means to pursue his goal of ending an ill-timed strike, did he decide to pursue these issues.

27. The Board has a discretion under section 91 of the Act to decline to hear a complaint on the merits. Over the years, the Board has developed a considerable body of caselaw dealing with the exercise of this discretion in the context of apparent delay in filing a complaint. The starting point of the Board's considerations of this issue is the reality that expedition in the resolution of labour relations disputes is essential to the maintenance of orderly labour-management relations. Most of the Board's cases on this issue relate to delays in the filing of fair representation cases. In its oft-cited reasons in *The Corporation of the City of Mississauga*, [1983] OLRB Rep. June 875, the Board reviewed the type of factors it has taken into account in deciding whether to exercise its discretion against inquiring into a complaint:

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reason for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged

contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to the parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

28. More recently, the Board has observed that there may be cases where, depending on the combination of relevant factors, a delay of considerably more than a year will not prevent a hearing on the merits of a complaint or, conversely, a delay of considerably less than a year may warrant dismissal. Further, it also goes without saying that the factors outlined in the *Mississauga* case should not be viewed as exhaustive, for there may be additional concerns peculiar to any particular case: see *Eastern Welding*, (decision dated June 14, 1994 as yet unreported.)

29. The Board has also observed that the passage of time during which a responding party has no notice that its conduct may be called into question is inherently prejudicial, and where the delay is excessive, it is not necessary to establish specific prejudice. In such a circumstance, absent a credible and reasonable explanation for the delay, the Board will decline to inquire into a complaint: see *John Kohut*, [1991] OLRB Rep. Dec. 1367.

30. In addition to cases of fair representation, the Board has also considered the consequence of undue delay on other types of applications. In *Eastern Welding*, *supra*, a case concerning the alleged improper layoff of a union supporter, a delay of 8 and 1/2 months was sufficient to lead to the dismissal of the complaint made under section 91 of the Act, in the absence of any justification for the delay.

31. Although the legal context is somewhat different than in the application before us, the treatment of delay issues by the Board in applications for interim relief is instructive. These cases highlight the fact that it is not necessarily the *length* of a delay that holds significant labour relations consequences, but the *intervening events* which occurred during the period of delay. For instance, in *Avenor Inc.* (decision dated April 26, 1994 as yet unreported) [now reported at [1994] OLRB Rep. Apr. 340], a delay of fourteen days was a significant factor in the Board's decision to dismiss an application for interim relief, where during that period of fourteen days, the responding party had taken certain steps that would clearly have been difficult to reverse. In *William Neilson Ltd.*, [1994] OLRB Rep. Mar. 326, a delay of seventeen days, during which time the employer effected the impugned structural changes to the workplace, was also a significant factor in the Board's decision to dismiss an application for interim relief.

32. In the case before us, following the strike vote and in reliance on the results of that vote, the union and the employer continued to negotiate towards a collective agreement. They underwent conciliation and, when the negotiations reached an impasse, prepared to invoke economic sanctions. The union commenced its strike, with respect to the full-time unit, on April 11 and with respect to the part-time unit, on April 16. Only on May 2, three weeks into the strike and eight weeks after the vote, was the union made aware that legal proceedings to challenge the procedure of its strike vote would be taken. This application was filed on May 5.

33. There can be few situations as volatile and fluid in the life of a collective bargaining relationship as the time in which the parties are engaged in a strike. Almost equal in intensity is the time preceding a strike or lock-out, when the parties are engaged in negotiations towards an anticipated strike or lockout. To the extent that certain assumptions are made by both sides to the negotiations about the context within which these negotiations take place, these assumptions become part of the fabric of the relationship during this crucial period. In the case before us, the parties to

the negotiations understood that the union had received a strong strike mandate. Nothing before us suggests that either party had any reason to think that this mandate was open to challenge under section 74(4), and both in good faith proceeded on this basis. Because of the provisions of section 73.1, the union and the employer would both have anticipated that the effect of this strike mandate was that in the event of a strike or lockout, the ban on replacement workers would apply.

34. The result of all of this is that the negotiations and preparations towards a strike or lockout, and the strike itself, were based on good faith assumptions on the part of both sides to the negotiations, about the relative strength of their bargaining power in the event of a strike. It would be impossible to measure the degree of influence that these assumptions had on the dynamics of the relationship during this period, on the positions taken and withdrawn, and on the union's decision to call a strike. We have no doubt it was considerable.

35. To this we add the factor that as negotiations proceed to impasse and a strike begins, it becomes less and less realistic to think that a union whose strike mandate has been called into question will be in any position to hold another vote which will recreate the atmosphere which was current at the time the original vote was taken. Applicant's counsel recognized this difficulty in his submissions, acknowledging that there might well be very different incentives to vote one way or another at this date, than in March. Realistically, the later this issue is raised, the less likely it is that a union will be able to remedy the problem if it is found to be substantiated, by holding another vote. The passage of time, therefore, increases the severity of the consequences to the union of a potential negative determination on this type of application. It is one response to say, as was suggested in counsel's submissions, that if that is the case, it is only the result of the union's own misconduct in the handling of the vote. However, to the extent that there is merit to the principle that the union ought to bear the consequences of its own actions, there is also merit to the principle that it may not be fair for a litigant to bear the consequences to the extent they might have been avoided with timely action by the opposing side.

36. We find, therefore, that in the context of collective bargaining to impasse and the onset of a strike, any significant delay in raising an issue which challenges some of the crucial assumptions underlying the negotiations and strike will lead to considerable prejudice. It would be consistent with and promote the rational and sensible ordering of labour relations for the Board to expect that disputes during this period be raised and pursued with some promptness. We find that a delay which extends over almost two months and covers a crucial period of negotiations, and several weeks of a strike, is significant. We therefore turn to a consideration of the reasons for this delay, and whether balanced against this prejudice, they support the exercise of our discretion in favour of determining the merits of this case. We have found that they do not.

37. In this case, the applicant was certainly aware of the facts set out in support of the application on the very evening of March 8. The applicant, although not perhaps legally sophisticated, was able once he decided it was necessary, to retain and seek the advice of counsel. The applicant was also not adverse to using both formal and informal methods within the union to press any concerns he had. Despite all of this, he chose not to pursue the issue regarding the strike vote until sometime in the latter part of April. We are compelled to the conclusion that the applicant did not pursue this issue when it did not suit his other purposes, and subsequently decided to pursue this issue when it became consistent with his other purposes i.e., to derail the strike he had initially supported. This is therefore unlike a case where an individual believes he or she has a complaint but through inexperience takes some time to focus the concerns. The applicant had the resources available to him early on to focus his concerns, if indeed he was concerned. Rather than providing any reasonable explanation for his delay in filing this application, his actions instead reveal one of

the very mischiefs that the Board's delay caselaw seeks to avert: that of the complaint kept in a "back pocket".

38. In response to the submissions of union counsel regarding delay, counsel for Marriott suggested that it would be premature to require a member to litigate an issue regarding the conduct of a strike vote before a strike actually begins. It is only once a strike begins that the issue is "actualized". We cannot agree with this, on the facts of this case. There might be situations where a strike vote is held well before it is clear that it will have any concrete effect, and it would be undesirable for the Board to encourage needless litigation by suggesting that a complaint ought to be made shortly after such a vote. However, on the facts of this case, it is clear that even at the time of the vote, the parties saw a strike as a looming possibility. The basis of the strike vote was an offer by Marriott, which the union found unacceptable. On the evening of the strike vote, the union sought volunteers for picket captain duty and shortly after the vote, began to make its preparations for a strike. A strike, therefore, was far from a distant or unlikely event to the persons involved on March 8.

39. We therefore find that the delay in the filing of this application is significant, because of the events which occurred during the period of the delay. We find that the applicant has shown no reasonable explanation for this delay. Because of our findings, it is unnecessary for us to deal with the other objection raised by the union, relating to improper motivation. Accordingly, because we have decided to exercise our discretion against inquiring further into the merits of this complaint, the application is dismissed.

2367-93-R Labourers' International Union of North America, Local 506, Applicant v. The Board of Governors of Exhibition Place and **Medieval Times Dinner & Tournament (Toronto) Inc.**, Responding Parties

Remedies - Sale of a Business - CNE and Labourers' union bound to collective agreement covering cleaners working at various buildings at Exhibition Place - CNE leasing one of those buildings to business (Medieval Times) providing dinner and entertainment - Medieval Times using cleaning contractor to perform cleaning services - Board satisfied that criteria in section 64.2 of the Act proved, that "premises" encompassing entirety of Exhibition Place, that CNE had ceased to provide certain cleaning services and that substantially similar services provided by "another employer" - Application allowed - Board declaring that sale of a business deemed to have resulted from CNE to Medieval Times - Board also declaring that Medieval Times bound by notice to bargain delivered by Labourers' union to CNE

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Kobryn*.

APPEARANCES: *Murray Gold* for the applicant; *Carl Peterson* for the responding party, The Board of Governors of Exhibition Place; *S. John Page* for the responding party, Medieval Times Dinner & Tournament (Toronto) Inc.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER, H. KOBRYN; July 11, 1994

1. Introduction

1. This is an application brought pursuant to section 64.2 of the *Labour Relations Act*. The applicant (also referred to herein as “Local 506” or “the union”) asserts that, by virtue of section 64.2 of the Act, a deemed sale of a business has occurred from the Board of Governors of Exhibition Place to Medieval Times Dinner & Tournament (Toronto) Inc. (referred to herein as “Board of Governors” and “Medieval Times”, respectively), and that we should so declare. The union also asks for a declaration that Medieval Times is bound by a notice to bargain dated February 25, 1993 which has been delivered to Board of Governors. The responding parties resist these conclusions, and submit that the application should be dismissed in its entirety.

2. The Facts

2. The Board heard the testimony of three witnesses, but there was little if any disagreement on the salient facts, which are described immediately below. Board of Governors operates the Canadian National Exhibition (“the CNE”) every year on the grounds of Exhibition Place in Toronto, Ontario. The Exhibition Place grounds contain a number of buildings (such as the Automotive Building, the Ontario Government Building, and the Queen Elizabeth Building) which are leased by Board of Governors to third parties for special events such as the Royal Winter Fair, the Molson Indy and Caribana. These buildings are also regularly leased to third parties for trade and consumer shows and other functions (such as examinations for CGA, CMA, Architecture and Bar Examination students, sports collectables shows, fur liquidation sales, etc.). As well, certain buildings are leased to semi-permanent tenants (such as the Horse Palace to The Riding School).

3. Local 506 and Board of Governors are bound to a collective agreement effective from May 1, 1991 to April 30, 1993 (hereinafter “the collective agreement”). A notice to bargain for a renewal contract was given by Local 506 to Board of Governors dated February 25, 1993, pursuant to the collective agreement. The collective agreement contains the following recognition clause:

The employer recognizes the Labourers’ International Union of North America, Local # 506 as the Bargaining Agent for all employees of the employer working at Exhibition Place, in Metropolitan Toronto, Ontario who are employed in classifications set out in Appendix “A” or “B”, and whose work duties consist wholly or in part of the work duties described therein, save and except non-working foreman and persons above the rank of non-working foremen [sic], Office and sales staff.

Appendix “B” to the collective agreement contains four different classifications of cleaners, with certain cleaning functions corresponding to each of the classifications. It was agreed by the parties that this collective agreement was a merged collective agreement, comprised of a former “stadium” agreement and a former “non-stadium” agreement, although the existence of these predecessor agreements has no practical effect on the ultimate determination of this case.

4. The dispute before the Board arises as a result of the lease by Board of Governors to Medieval Times of the Arts, Crafts and Hobbies Building on the grounds of Exhibition Place for a term of thirty years duration, with two ten-year extensions which can be exercised at the option of Medieval Times. For a number of years prior to the lease of the Arts, Crafts and Hobbies Building to Medieval Times, Board of Governors utilized the Arts, Crafts and Hobbies Building to house an Arts and Crafts show and various trade and consumer shows. Board of Governors used cleaners who are members of Local 506 to clean the Arts, Crafts and Hobbies Building during and after these trade and consumer shows. When the building was not utilized for a show or event, it was not cleaned, and left dormant until the subsequent show or event. This is, in fact, the case for all buildings located on the grounds of Exhibition Place.

5. In late 1992 or early 1993, Medieval Times commenced negotiations to lease the Arts, Crafts and Hobbies Building, and a patch of surrounding property, from Board of Governors in order to house its operations in Toronto. By way of an Agreement to Lease dated March 11, 1993, Medieval Times agreed to lease the Arts, Crafts and Hobbies Building and certain adjacent lands from Board of Governors for the term of years referred to above. No lease had been executed as at the date of the hearing. However, Medieval Times took possession of the Arts, Crafts & Hobbies Building in late April, 1993. Board of Governors forwarded a copy of the collective agreement to Medieval Times for its review prior to the execution of the Agreement to Lease in March, 1993.

6. The business of Medieval Times involves the provision of dinner and entertainment based on a medieval theme. Patrons pay a fixed price for admission to the Medieval Times Castle and are provided with a four-course meal and a two-hour show based on the theme of a medieval tournament. Significant renovations were performed by Medieval Times to the Arts, Crafts and Hobbies Building to create a medieval castle-type structure, and a forty thousand square foot arena was constructed on the property adjacent to the Arts, Crafts and Hobbies Building which houses the dinner area and a performing arena. A bridge links the two buildings. The renovations to the Arts, Crafts and Hobbies Building, and the construction of the adjacent arena, were completed by August, 1993, and the operations of Medieval Times commenced that same month, coincident with the opening of the CNE.

7. The physical space occupied by Medieval Times is now cleaned by individuals who are *not* members of Local 506. The evidence before the Board is that the large complement of Medieval Times employees (182 employees as at December 23, 1993, including bartenders, bar assistants, cocktail waitresses, cooks and stable crew) perform basic cleaning tasks as part of their broader job responsibilities. That is, as part of a bartender's job responsibilities, he or she would be responsible for performing basic cleaning tasks at the bar, including garbage removal. The exception to this pattern are some general cleaning services which Medieval Times has contracted out to After Five Office Cleaning (hereinafter "After Five"). This includes vacuuming of carpets, cleaning and re-supplying of washrooms, wet cleaning of non-carpeted floors, polishing of floors, dusting of offices and removal of some garbage. The evidence before the Board was that Medieval Times has three persons from After Five attend on site after show hours for seven hours of cleaning work each, six times per week. One After Five employee is on site during the show for four hours, six days per week, to tidy washrooms. The three person crew referred to above spends an estimated seventy to eighty per cent of its time cleaning the arena and eating area.

8. Counsel for Board of Governors provided the Board with figures outlining the number of cleaning hours worked by Local 506 employees at Exhibition Place and, in particular, at the Arts, Crafts and Hobbies Building, during 1991 and 1992. Although counsel for the union disputed the relevance of the figures, he did not dispute their accuracy. These figures are the following:

<i>Year</i>	<i>Cleaning Hours — Exhibition Place</i>	<i>Cleaning Hours — Arts, Crafts & Hobbies Building</i>
1991	110,125	2,777
1992	116,421	1,405

9. It was the uncontradicted evidence of Linda Simpson, Co-ordinator of Cleaning Services for Exhibition Place, that there are currently approximately 45 unionized cleaning staff at Exhibition Place, and that the average employee spent approximately two per cent of his or her total working hours cleaning the Arts, Crafts and Hobbies Building in 1992. Ms. Simpson also testified that none of the shows or events which had been located in the Arts, Crafts and Hobbies

Building in 1992 had been lost to the Board of Governors for 1993 as a result of the lease of the Arts, Crafts and Hobbies Building to Medieval Times. With one exception, no loss of events or shows was anticipated by Ms. Simpson for 1994. It was also her evidence that no unionized employee had been laid off as a result of the dedication of the Arts, Crafts and Hobbies Building to Medieval Times, as all of the shows and events which would have been held in that building beyond April, 1993 were merely relocated to *other* buildings at Exhibition Place, which required cleaning during and after the show or event. This cleaning was performed by members of Local 506. The hours of work of the cleaners had not been diminished by the transfer of shows and events to other buildings on the grounds of Exhibition Place.

10. Finally, it was the uncontradicted evidence of Ms. Simpson that Local 506 members did not and do not perform all of the cleaning required at Exhibition Place. A number of semi-permanent tenants and shows make private arrangements to ensure their cleaning requirements are satisfied. Whether Local 506 employees perform the work depends upon whether Board of Governors obtains a cleaning contract for those shows and/or tenants at the time that the building lease is effected. No such contract was obtained from Medieval Times.

11. It was on the basis of the above facts that the parties argued the application of section 64.2 of the Act.

3. Argument

12. Counsel for Board of Governors characterized this case as one which will determine the limits of the application of section 64.2 of the Act. Counsel submitted that, should the union's interpretation of section 64.2 be adopted by the Board, the reach of the section would be extended far beyond both the intent and the spirit of the legislation. Counsel focused the bulk of his argument on the specific words contained in section 64.2 of the Act, their meaning, and their application to the facts before the Board.

13. Counsel submitted that the protections contained in section 64.2 of the Act were added to the *Labour Relations Act* as part of the Bill 40 amendments to the legislation in order to ameliorate the consequences of prior Board jurisprudence which found section 64 of the Act and its predecessors to be inapplicable to a change of contractors due to the retendering of a contract, particularly in the building cleaning industry. Counsel observed that amendments to both the *Employment Standards Act* (R.S.O. 1990, c. E-14, as amended) and the *Labour Relations Act* were effected simultaneously in order to protect (amongst others) cleaning employees from the loss of representation in certain situations. It was submitted that the Legislature had prescribed by the terms of the amended legislation limited circumstances for the application of section 64.2 of the Act.

14. Counsel submitted that section 64.2(1) of the Act sets the tone for the application of the entire section, and dissected the various concepts identified in the subsection. Counsel urged the Board to equate the term "premises" contained within subsection (1) with the term "building" also contained therein, on the basis that the "services" provided by or to a building owner must, by the terms of this section, relate to "servicing the premises". Counsel argued that, to the extent that this section of the Act focuses on the "building", it does so because of the term "services", a word which cannot be separated from the term "premises".

15. Counsel then focused his argument on section 64.2(3) of the Act, which contains the deeming provision of the legislation. Counsel pointed out that a deemed sale of a business under section 64 of the Act does not occur unless all three conditions or criteria contained in this subsection are satisfied.

16. The language contained in section 64.2(3)(a) was reviewed in detail by counsel. He submitted that the provision, by qualifying its application to situations where the premises in question are the "principal place of work" of employees, contemplates a situation where employees may work at a number of different locations. He further submitted that the word "premises" in this subsection, read in context with section 64.2(1), must again mean "the building". Accordingly, if an employee works at a building doing building cleaning pursuant to a collective agreement, but the building is not his or her "principal place of work", then the collective agreement does not follow the services if there is a change in contractors. Counsel provided the Board with the definition of the word "principal" from the Shorter Oxford English Dictionary, as meaning any of "chief", "main", or "first in rank or importance". This, submitted counsel, suggests that for section 64.2 to apply in the case before the Board an employee would have to spend the primary part of his or her work day or year at the Arts, Crafts and Hobbies Building. Counsel pointed out that the evidence before the Board suggested that prior to April, 1993 any one employee spent very little time over the course of a day or a year at the Arts, Crafts and Hobbies Building performing cleaning tasks.

17. With respect to section 64.2(3)(b), counsel observed that the words "at those premises", on his theory of the case, referred back to the building in question. It was his submission that a plain reading of the subsection again compels one to conclude that the word "premises" refers to the word "building", and that here the "premises" referred to must be the Arts, Crafts and Hobbies Building.

18. Counsel argued in the alternative that, if his interpretation were wrong, and should the term "premises" be interpreted to mean all of Exhibition Place, then the union must nonetheless be unsuccessful in its application as it did not then satisfy section 64.2(3)(b) of the Act, because the Board of Governors has not "ceased" to provide "the services" in question at the "premises" - being Exhibition Place - and, as the hours of work of the employees of Local 506 have not been affected (either cumulatively or individually), the employer has not ceased to provide the services even "in part". Counsel submitted, therefore, that no matter how the term "premises" is defined by the Board, the union must be unsuccessful in this application.

19. Counsel further noted that, under the collective agreement in force at Exhibition Place, the union does not have rights to *all* of the cleaning that occurs at Exhibition Place, or to any particular cleaning in any particular location at Exhibition Place - and he identified a number of buildings or structures that Local 506 members did not clean on a daily basis (examples being the Bandshell, the Swiss Chalet Restaurant, and most of the booths in the Food Products Building). Counsel noted the evidence of Linda Simpson who testified that the Board of Governors attempts to obtain cleaning contracts for the shows and events which occur on Exhibition Place grounds. If the cleaning contracts are not obtained, Local 506 employees do not clean the premises. He noted that the Board of Governors does not have a contract with Medieval Times to perform cleaning at their buildings. (No evidence was adduced of any efforts made by Board of Governors to secure such a contract).

20. As a final, alternative argument on the interpretation of section 64.2(3)(b) of the Act, counsel for Board of Governors urged the Board to conclude, if the "premises" are defined as "Exhibition Place", that the loss of the work by Local 506 employees at the Arts, Crafts and Hobbies Building does not constitute even a cessation of "part" of the services at those premises for the purposes of section 64.2(3)(b), due to the insignificant amount of the work previously performed by Local 506 employees at the building. Counsel noted that Board jurisprudence regarding the "sale of a business" under section 64 of the Act establishes that a sale of a "part" of a business occurs only when a "concrete and viable" part of the business has been sold. In his submission, the same analysis can be applied to section 64.2 of the Act, and if applied to the facts of this case

would lead us to the conclusion that no concrete and viable “part” of the cleaning services had ceased to be provided at the premises.

21. With respect to the terms of section 64.2(3)(c) of the Act, counsel for Board of Governors generally deferred to the submissions of counsel for Medieval Times, and indicated that he concurred with the analysis of Mr. Page.

22. Counsel for Medieval Times also closely reviewed the words of section 64.2 of the Act during argument. He concurred with counsel for Board of Governors that, on the facts of this case, even if Exhibition Place is considered to be the “premises”, the union could not satisfy section 64.2(3)(b) of the Act so as to establish all three elements of section 64.2(3), and therefore deem the transaction to be a “sale of a business” for the purposes of section 64 of the Act.

23. Counsel proceeded to focus much of his argument on section 64.2(3)(c) of the Act, and in particular the concept of “substantially similar services”. In counsel’s submission, the interpretation of these words is dependent upon the nature of the ultimate receiver of the services, as well as the nature of the service which is provided. On the facts of this case, the cleaning in the Arts, Crafts and Hobbies Building previously performed by Local 506 members consisted of sweeping, garbage removal and cleaning of washrooms, whereas now the cleaning services provided at the Medieval Times Castle and Arena also include food clean up, bar clean up, kitchen maintenance, horse stable cleaning, etc. Counsel submitted that these latter services cannot in any way be considered to be “substantially similar” to those previously performed by Local 506. Counsel observed that, from the perspective of remedy, the “apples and oranges” differences in the tasks performed before and after Medieval Times leased the Arts, Crafts and Hobbies Building makes an effective remedial response by the Board difficult to craft.

24. Counsel submitted that the work that appears to be closest to a “substantially similar service” currently performed at the Medieval Times location is the work performed by After Five. He distinguished that work from that performed by Local 506 members on the basis that eighty per cent of the work done by After Five is done in the newly constructed building adjacent to what was the Arts, Crafts and Hobbies Building. The work is not, therefore, “substantially similar”, because it is both different in nature and performed in a different location.

25. Counsel referred the Board to a number of governmental policy papers regarding the Bill 40 amendments to identify the mischief and purpose behind the amendments to the *Labour Relations Act* which are reflected by section 64.2 of the Act. In essence, counsel submitted that the amendments were passed to ameliorate the development of the law as it related to the loss of bargaining rights in tendering situations, and the loss of bargaining rights as a result of a movement of contracted work “in house” by an employer after having previously contracted it out. Counsel observed that there was no reference in any of the policy materials prepared by the Ministry of Labour to a situation such as the one before the Board.

26. Counsel stated that the position taken by the responding parties satisfies the policy concerns identified in the governmental policy papers produced in argument. He submitted that the legislation was never intended to extend to the situation where a third party leased a building from an owner and where the services previously performed for the owner in the building were merely moved to another building within the scope of the collective agreement. Counsel submitted that the application, if it were successful, would cause an extension of the union’s bargaining rights, which would be contrary to Board jurisprudence on section 64 of the Act - especially where, as here, no bargaining rights or bargaining unit jobs have been lost, or hours of bargaining unit employees reduced. It was submitted that the Board should go no further than protecting the bargaining rights of Local 506.

27. Counsel for Medieval Times also submitted that the Board did not have jurisdiction to extend the remedy to any work performed in the new building; that is, as there is no “former” building from which a sale could have occurred, a sale of a business could not possibly be “deemed” in these circumstances. He asked that the Board dismiss the application.

28. Counsel for the applicant prefaced his remarks by noting that, in his view, it was important to focus on what had really happened at Exhibition Place. In this case, an owner of certain premises, the premises being Exhibition Place, utilized members of Local 506 to clean those premises, and then ceased in part to do so, the services now being done in part by another cleaning company and in part by employees of a lessee. Counsel submitted that this situation was clearly within the scope of the mischief to be remedied by section 64.2.

29. Counsel directed the Board’s attention to the particular language of section 64.2 of the Act. In counsel’s view, the bargaining rights of those businesses to which section 64.2 applies now attach to the “premises” and not the business. In that regard, counsel urged the Board to conclude that the word “premises” within section 64.2 must mean, in this case, “Exhibition Place”. Counsel questioned the logic of opposing counsel in equating the terms “business” and “premises”, especially in light of the use of both terms in the same sentence of section 64.2(1) of the Act. Assuming the Legislature had intended to refer to the same concept, why, counsel asked rhetorically, would it choose to use two different words? Counsel noted that the concept of “servicing the premises” extends beyond just the building, and would include at least the land around the building. Counsel provided the Board with definitions of “premises” from *The Concise Oxford English Dictionary* and from “Words and Phrases Legally Defined” (3rd Ed) illustrating that the concept of “premises” has been interpreted to extend beyond that of just a physical “building”.

30. Counsel for Local 506 agreed that all three conditions in section 64.2(3) must be satisfied before a deemed sale of a business for the purposes of section 64 is effected by the legislation. With respect to subsection (3)(a), counsel urged the Board to conclude that the applicant had successfully satisfied the condition insofar as “Exhibition Place” is the primary place of work for these employees of Local 506 - that is, that “Exhibition Place” is the “premises” referred to in section 64.2(3)(a). In counsel’s submission, the inclusion of the concept “principal place of work” in subsection (3)(a) was intended to exclude from the application of the section the situation where temporary help agencies clean a building on a very short-term basis. Counsel observed that Article 2.01 of the collective agreement circumscribed the applicant’s bargaining rights to “Exhibition Place”, and urged the Board to conclude that the “premises” must accordingly be defined to mean Exhibition Place.

31. Counsel asked the Board to assume, for the purposes of argument, that Exhibition Place were a vertical tower, similar in nature to a tall office tower, rather than a number of buildings spread out horizontally. He submitted that, should a unionized contractor have successfully tendered for a contract to clean six floors of the tower, and should that contract be lost to that unionized contractor as a result of a successful tender by *another* company, that new subcontract would be captured by section 64.2 of the Act. Counsel noted that, on opposing counsel’s theory, the subcontract would not be captured by section 64.2 because no one employee would work primarily on all six of the floors. If opposing counsel’s theory was correct, he submitted, section 64.2 would have no practical meaning or effect.

32. With respect to section 64.2(3)(b) of the Act, counsel focused on the words “in whole or in part” to counter opposing counsel’s arguments; that is, counsel submits that there has been, on the facts of this case, a partial cessation of the work with respect to the Arts, Crafts and Hobbies Building, the particular building leased by Medieval Times. Counsel urged the Board to focus

on the “premises”, being Exhibition Place. The services under the collective agreement which are relevant here - building cleaning services - have ceased on part of those “premises”. The employer owns the same business, still does what it previously did, but does less of it, because there are “less” premises. It is not the volume of work which matters here, submitted counsel, because the legislation requires the Board to “keep its eye on” the physical building which is the Arts, Crafts and Hobbies Building. Counsel returned to the analogy drawn regarding the office tower, and suggested that it would be no answer to an application under section 64.2 of the Act for an employer who had successfully tendered for a contract for cleaning services to observe that the predecessor had just obtained a cleaning contract at *another* building down the street and that no hours were lost to the employees of the predecessor who could now work there.

33. Counsel for Local 506 observed that, taking opposing counsel’s argument to its logical extension, section 64.2 of the Act would not apply to Exhibition Place unless it were let in its *entirety* to another entity. That is, due to the large number of separate buildings on the Exhibition Place grounds, even if the most time spent in cleaning any one building by an employee as a percentage of the total time spent at work approximated twenty-five per cent, it would be virtually impossible for a trade union to succeed under section 64.2 - if the “percentage of time worked at the building” approach is adopted by the Board as a determining factor.

34. With respect to the interpretation of section 64.2(3)(c) of the Act, applicant’s counsel acknowledged here as well the fundamental disagreement of the parties on the interpretation of the Act. Counsel did not dispute that Medieval Times is a unique business, far different in nature from the business of Exhibition Place. Counsel questioned the relevancy of the fact that the use of the premises had changed, and submitted that the key to deciding the case was the nature of the services provided in the building.

35. Counsel submitted that the phrase “substantially similar services” did not, as was urged by the counsel for Medieval Times, set a high threshold for comparison. On the contrary, counsel suggested that the modifying words “substantially similar” suggested that identical services need not be provided on the premises, thus giving the Board some latitude in making the assessment required by the Act. Counsel submitted that the Board “should not get hung up” if some aspects of the services provided are now different. In fact, he acknowledged that the building cleaning services provided will almost always be different in cases similar in nature to that before the Board, as tenants who replace other tenants or owners will typically bring with them different cleaning requirements. Counsel submitted that this reality should not determine the interpretation of section 64.2(3)(c).

36. Furthermore, counsel submitted that the Board should not concern itself with the nature of the business of the tenant. Counsel again drew an analogy to an office tower. If a bank, the major tenant of an office tower, decided today to perform cleaning work “in house” rather than by way of subcontract with the building management, as it had in the past, counsel submitted that even though the nature of banking is different from the nature of property management/development, section 64.2(3)(c) should nonetheless be satisfied in the circumstances. He submitted that the focus should be on the nature of the *services* provided with respect to the premises, rather than the nature of the *user* of the premises.

37. With regard to section 64.2(3)(c) of the Act, and opposing counsel’s argument regarding the scope of the phrase “substantially similar services”, counsel for Local 506 submitted that the type of work currently being performed by Medieval Times employees and After Five employees had, at least in part, been performed by Local 506 members prior to April, 1993. Reference

was made to the collective agreement which describes the type of work to be performed by building cleaners employed by the Board of Governors.

38. Counsel turned his argument towards the testimony that Board of Governors, as part of the process leading up to the execution of the Agreement to Lease, forwarded to Medieval Times the collective agreement between Board of Governors and Local 506. Counsel submitted that this suggested that the parties to the Agreement had some knowledge that the collective agreement might apply to Medieval Times.

39. Counsel addressed Board of Governors' argument that, because the time spent by the applicant's members in the Arts, Crafts and Hobbies Building was, in effect, *de minimus*, and because the words "in part" contained in section 64.2(3)(b) should be interpreted to mean a "concrete and viable" part of the services, the requirements of section 64.2(3)(b) of the Act had not been satisfied by the applicant. Counsel for Local 506 disagreed with this submission, and suggested that the true analogy was whether the Arts, Crafts and Hobbies Building was a "concrete and viable" and severable part of Exhibition Place. He noted that the plain words of section 64.2(3)(b) required only that the services cease "in whole or in part", and not "in whole or in "big" part".

40. With respect to opposing counsel's argument that an effective remedy would be difficult to craft should the application be allowed, counsel for Local 506 noted that the remedy sought by the applicant is only that the Board order that the collective agreement is binding on Medieval Times. He conceded that much of the work performed by employees at Medieval Times was not work performed previously by Local 506 members (i.e. bartending) and made no claim to the work. He submitted that, to the extent there remained a dispute over the application of the collective agreement, that problem could be dealt with by a grievance proceeding to arbitration. In counsel's submission, the problem is a small one and should be of little weight to the Board.

41. With respect to opposing counsel's argument that the work is not "substantially similar" because up to eighty per cent of it occurs on the new addition to the Arts, Crafts and Hobbies Building, counsel for Local 506 submitted that it was important to note that the words "substantially similar" in section 64.2(3)(c) modifies the words "services" and not the word "premises". Counsel submitted that here the services provided are the same. In any event, as the term "premises" means "Exhibition Place", whether a new building was or was not constructed on Exhibition Place grounds is irrelevant.

42. With respect to opposing counsel's argument regarding legislative intent, and the government policy papers submitted to the Board, counsel for the applicant questioned the helpfulness of the documents, as they were not, in his view, meant to identify every situation to which section 64.2 of the Act may apply. Most importantly, suggested counsel, they are not the legislation, and counsel submits that section 64.2 by its clear terms extends beyond the problems identified in the documents. In counsel's submission, this case is not a re-tendering case, or a contracting-in case, in the narrow, classical sense. Instead, this case involves a situation where an owner leases property to a tenant and the tenant prefers to contract out the work previously done by the owner. In counsel's view, this scenario is anticipated by section 64.2 of the Act, as it reflects the same mischief which the section of the Act was meant to remedy. The only distinction here is the intermediary of the tenant, which should make no difference at all.

43. In reply argument, counsel for Medieval Times disputed the applicant's suggestion that section 64.2 now permits bargaining rights to attach to premises. Counsel submits that, if the Legislature had intended such a conclusion, it would have stated such in section 64.2 in far simpler terms than the section currently reads. As a result, counsel disputes that the Legislature intended for bar-

gaining rights to flow with the building. Counsel submitted that section 64.2 of the Act requires the Board to follow the service. Counsel noted that, had the Board of Governors closed the Arts, Crafts and Hobbies Building, the rights of Local 506 members would have continued in the other buildings of Exhibition Place.

44. Counsel was willing to concede that the concept of “premises” could well extend beyond that of the “building”, but only marginally, to include the immediately adjacent grounds, and submitted that for most purposes the terms could be considered the same. Counsel noted that the applicant’s position, that the term “premises” should equate to “Exhibition Place” because of the scope of the collective agreement, could easily have been enacted by the Legislature in section 64.2 of the Act. Counsel submitted that such a conclusion should not be reached by the Board.

45. Counsel also disputed the applicant’s submission that the review by Medieval Times of the Local 506 collective agreement, pursuant to the Agreement to Lease, had any relevance. In his submission the argument was a “red herring”, noting that it would be specious to suggest that if the Board of Governors had *not* forwarded the collective agreement to Medieval Times for review that it would be inapplicable to the situation.

46. Counsel for Board of Governors reiterated in reply a number of his previous submissions. As well, counsel submitted that the applicant was simply attempting by this application to extend its bargaining rights. He drew an analogy to the situation where a unionized employer erected a building which was not captured by the scope clause of a collective agreement, and submitted that the Board had no jurisdiction to extend bargaining rights to the new building pursuant to section 64.2 of the Act. Counsel observed that no services have been lost at Exhibition Place, nor have any bargaining rights been lost.

47. With respect to the argument that the collective agreement provides the applicant rights for the whole of Exhibition Place, counsel submitted that cases are legion that say that bargaining rights do not attach to land or work, but instead attach to employers. Finally, counsel submitted that opposing counsel’s fundamental error was that he focused on the property and ignored use of the term “services” in section 64.2 and that he also ignored the fact that this section was designed to protect bargaining rights and not to extend them. Here, in counsel’s submission, Local 506 has lost nothing, and is merely trying to expand its rights into a new building.

4. Decision

(i) Application of Section 64.2

48. Section 64.2 of the *Labour Relations Act* provides as follows:

64.2-(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

(2) This section does not apply with respect to the following services:

1. Construction.
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

(3) For the purposes of section 64, the sale of a business is deemed to have occurred,

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.

(5) This section shall be deemed to have come into force on the 4th day of June, 1992.

49. As was acknowledged by counsel who argued this case, this is one of the first opportunities for the Board to consider in detail the substance of section 64.2 of the Act. Counsel took radically different viewpoints as to the purpose and scope of this provision, which was added to the Act as a result of the Bill 40 amendments which came into effect on January 1, 1993 (although section 64.2 of the Act is deemed by section 64.2(5) of the Act to have come into force on June 4, 1992).

50. Section 64.2 of the Act, should it apply to the facts of any particular case before the Board, has the effect of deeming a "sale of a business" to have occurred for the purposes of section 64 of the Act. Accordingly, the consequences of section 64 of the Act will be imposed on the parties by operation of law; that is, should section 64.2 of the Act apply to a factual situation, it is unnecessary for the Board to consider whether the factual situation is properly characterized under section 64 of the Act as a "sale", and whether the economic entity transferred to the alleged successor constitutes "one or more parts of a business" as defined by section 64 of the Act. The transaction is deemed to be a sale of a business for the purposes of section 64.

51. Counsel for the applicant, in his opening remarks, submitted that section 64.2 of the Act has established a new paradigm for successor rights applications, and suggested that the two step analysis applied by the Board to section 64 applications should be of no application to section 64.2 of the Act. We agree with counsel that section 64.2 is a new point of departure for the Board, and observe that the blind application of previous Board jurisprudence or principles relating to section 64 of the Act or its predecessors would be inappropriate. This does not, however, preclude the application of particular principles which have been established by the Board under its section 64 jurisprudence. The application of one or more of those principles depends upon the facts of the case before the Board, and it would be inappropriate for the Board to limit or circumscribe the application of those principles at this early stage of the interpretation of section 64.2 of the Act.

52. Section 64.2 of the Act should, of course, be given a large and liberal interpretation, in accordance with section 10 of the *Interpretation Act*, R.S.O. 1990, c. I-11. It is the role of the Board to ensure that the intention of the Legislature in enacting section 64.2 of the Act is fully effected. However, determining the full extent and scope of the intention of the Legislature when enacting section 64.2 of the Act is not an easy task. The concept of legislative intent is amorphous and, in any particular case, the full scope of the intent of the Legislature may be incapable of exhaustive determination.

53. The difficult problem of determining legislative intent is reflected by the circumstances of this case. The documentation relied upon in argument by counsel for Medieval Times does suggest certain purposes behind the enactment of section 64.2 of the Act, but does not necessarily

reflect the full intent of the Minister of Labour or the Government regarding the full extent of the mischief that section 64.2 of the Act attempts to remedy. Instead, it reflects only the mischief as perceived by certain Ministry of Labour officials and is not necessarily an exhaustive comment on the full scope of the provisions. Nonetheless, in light of Board jurisprudence which existed prior to the enactment of section 64.2 of the Act, and in particular the decisions of *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 and *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. Nov. 1585, it is not difficult to conclude that one purpose of section 64.2 was to protect employees of unionized subcontractors from the consequences of that subcontractor losing a contract (usually by way of the tendering process) in the building cleaning, security and food services industries. As a result of the Board decisions referred to above, bargaining rights enjoyed by employees of subcontractors were not continued in the successor subcontractor (notwithstanding that typically the employees of the former subcontractor would be hired by the successful tenderer). All counsel acknowledged that one of the purposes behind the enactment of section 64.2 of the Act was to protect representational rights in these circumstances.

54. All counsel also agreed that another mischief that section 64.2 of the Act was meant to eradicate was the “contracting back in” of such work by an employer once bargaining rights had been established by a trade union with a subcontractor of that employer. Again, prior to the enactment of section 64.2 of the Act the protections of section 64 of the Act were unavailable to employees in these circumstances. Section 64.2 ensures that in those same circumstances the bargaining rights of the trade union representing the employees of the predecessor are maintained in the successor.

55. The question before the Board, though, is whether the intention of the legislature in enacting section 64.2 of the Act is reflected by the facts of this case. In our view, the answer to this question must be sought by considering the terms of section 64.2(1) of the Act, which reads, again, as follows:

This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

Section 64.2(1) of the Act defines the circumstances in which section 64.2 is applied. Distilling section 64.2(1) to its constituent elements, the section applies when

- (a) services relating to premises, including building cleaning services, food services and security services, are
- (b) provided, directly or indirectly, by or to a building owner or manager.

It is noteworthy to observe the broad language utilized by the Legislature throughout section 64.2(1) of the Act. The inclusive language adopted by the Legislature when referring to the enumerated services specifically identified by that subsection makes it clear that the enumerated services are not exhaustive of the entire range of services which may be captured by the section. The use of the broad phrase “related to servicing the premises” reflects the intention of the Legislature to encompass various other types of services which may be provided by or to building owners or managers. It is also noteworthy that the phrase “provided, directly or indirectly, by or to a building owner or manager” is also wide-sweeping in scope. It is manifest from the language of section 64.2 that the Legislature intended this provision of the Act to have broad applicability, and to encompass a wide range of commercial circumstances.

56. In light of the above-noted observations, we are of the view that the wording of section 64.2(1) of the Act clearly captures the transaction which is before the Board. It is evident from the facts of this case that, prior to the lease of the Arts, Crafts and Hobbies Building at Exhibition Place by Board of Governors to Medieval Times, "building cleaning services" were provided "directly or indirectly by ... a building owner or manager" which were "related to servicing the premises" (on a narrow or a broad interpretation of the word "premises"). Accordingly, the transaction between Board of Governors and Medieval Times is liable to be assessed by reference to the rights and obligations reflected by section 64.2 of the Act.

57. Counsel for the responding parties submitted during argument that section 64.2 of the Act was inapplicable to the facts before us because the provision was never intended by the Legislature to capture a lease-type transaction such as the one between the two responding parties, especially in light of the rather significant structural alterations to the Arts, Crafts and Hobbies Building which were undertaken by Medieval Times immediately after taking possession of the building. It was also submitted by counsel that section 64.2 had no application because Local 506 members were not out-of-pocket or otherwise negatively affected by this transaction. We reject both of these arguments.

58. In our view, the formal legal description or characterization of the transaction which results in the reorganization of the services in dispute on the premises is not a pertinent consideration in determining the applicability of section 64.2. The Board has historically considered and determined "sale of a business" applications on the basis of the substance of the transaction in question, without reference to form. We are of the view that this same approach must be taken to the interpretation of section 64.2 of the Act. Any transaction which falls within the broad scope of the application provision of section 64.2 will be subject to Board review upon application. The existence of alterations to the physical space undertaken by one of the parties to the transaction is likely to be of little importance when considering the potential application of section 64.2, although it may have some bearing on the satisfaction of the criteria contained in section 64.2(3) of the Act, depending on the facts of the case in question. Furthermore, whether the transaction has or has not had an effect on Local 506 members employed at Exhibition Place is also of little relevance, insofar as the terms of section 64.2 of the Act do not require, as a prerequisite to its application, proof of out-of-pocket loss or negative consequences to the trade union or members of the trade union. Accordingly, we reiterate our view that this transaction is liable to be assessed by reference to section 64.2 of the Act. As it was agreed amongst the parties that the exclusions enumerated in section 64.2(2) of the Act were inapplicable to the facts before us, we now turn to consider whether the transaction in question is deemed to be a "sale of a business" by section 64.2(3) of the Act.

(ii) Section 64.2(3)(a): "Premises"

59. All counsel were in agreement that the result of this particular application would largely depend upon the meaning attributed by the Board to the word "premises" contained in section 64.2 of the Act. This term is not defined in the legislation. Having considered the argument of counsel, we are of the view that the word "premises" in section 64.2 of the Act must be interpreted, on the facts of this case, to encompass the entirety of Exhibition Place, rather than the Arts, Crafts and Hobbies Building or some smaller geographical area. The analysis which leads us to reach this conclusion is as follows.

60. We agree with counsel for Board of Governors that the word "building" in section 64.2(1) of the Act must be read in conjunction with the word "premises" contained in that same subsection of the Act. A reading of that subsection, in a perfectly natural manner, can lead us to

no other conclusion. In fact, the word “premises” in that subsection is meaningless unless it refers to the word “building” which appears earlier in the subsection. That result does not, however, lead us to the further conclusion that the word “premises” should be interpreted as equating to the word “building” and therefore must mean, on the facts of this case, the Arts, Crafts and Hobbies Building.

61. There is merit to the applicant’s position that the Legislature, had it intended the word “premises” to equate to the word “building”, could just as easily have substituted the word “building” for that of “premises” in the section. Furthermore, there is nothing contained in section 64.2(1) which precludes the conclusion that the “premises” referred to could be smaller or larger in geographical size than the “building” referred to in that subsection. Utilizing the office tower example referred to in argument, should a building owner contract out only six floors of a multi-floor tower to a building cleaning contractor, it is not clear why these six floors are not “premises” for the purposes of section 64.2 of the Act, notwithstanding that they are not identical in concept to “the building” in which the floors are located. As was amply demonstrated by the definitions of the term “premises” provided to the Board during argument, common law interpretation of that term has extended the meaning of the word beyond that of merely a building, and can include reference to a broader geographical area.

62. More importantly, however, we are concerned that a reading of section 64.2 of the Act in the manner urged by the responding parties would eliminate the protections of section 64.2 of the Act, effectively eviscerating its contents. The fact situation before the Board is not a classic case of lost representational rights in the building cleaning services sector due to a re-tender of work or a contracting-in of work. It does, however, exhibit similar characteristics to those situations - Board of Governors, by leasing the Arts, Crafts and Hobbies Building to Medieval Times, and by not contracting with Medieval Times to provide the cleaning services of Local 506 members for the building, effectively loses the cleaning work for that building to After Five, the new contractor. Interpreting the word “premises” in the narrow way urged by the responding parties, especially in situations such as those before us, could well lead over time to a withering of the bargaining rights held by Local 506. There would therefore appear to be merit in the applicant’s concerns that an interpretation of the section in the manner proposed by the responding parties would be the start of a rather slippery slope.

63. This result is highlighted by a consideration of section 64.2(3)(a) of the Act, which contains one of the three criteria which must be satisfied for section 64.2 of the Act to apply to our facts. The “premises” where employees perform services must be their “principal place of work” for section 64.2 to apply. On the facts before the Board, if the term “premises” is defined to mean “the Arts, Crafts & Hobbies Building”, no employee could be said to satisfy that criterion. In point of fact, on the theory of the responding parties due to the large number of buildings on the grounds of Exhibition Place, no employee could currently identify *any* building as his or her ‘principal’ place of work. The practical effect of this interpretation of section 64.2 of the Act would be to permit the gradual disappearance of both bargaining unit work and bargaining rights by way of partial transfer of the cleaning services over time. We do not believe that the Legislature intended for such an effect to be the result of the application of the Act.

64. In our view, in order to interpret the provision in a fair, large and liberal manner, and in such a way as to ensure that the spirit of section 64.2 is recognized and not defeated, the word “premises” should be interpreted in a manner so as to encompass the entirety of Exhibition Place. As observed above, there is no reason to preclude an interpretation of the legislation which gives the term “premises” a broader scope than that of the word “building” contained in section 64.2(1). On the facts of this case, the mischief to be avoided by the Act can only be avoided if such an inter-

pretation is given to the Act. We feel it important to stress that the scope of the recognition clause in the collective agreement which extends the rights of Local 506 to the grounds of Exhibition Place has not led us to this result. There is no presumption of a correlation between the scope of the bargaining rights held by the trade union and the term "premises" contained in section 64.2 of the Act. Whether the "premises" equate to the geographical scope of bargaining rights held by the trade union in any particular case depends upon the facts of the case.

65. Dealing specifically with section 64.2(3)(a), therefore, we are of the view that the applicant, on the facts of this case, has satisfied the criteria contained therein. That is, we are of the view that the employees of Local 506 perform services at "premises" (Exhibition Place) that are their "principal place of work". There was no evidence before the Board to suggest that the principal place of work of any of the employees in question was other than at Exhibition Place.

(iii) Section 64.2(3)(b) - Ceasing to Provide Services

66. During argument counsel for the responding parties' both submitted that, even if the Board concluded that the 'premises' for the purposes of the Act was Exhibition Place rather than the Arts, Crafts & Hobbies Building, the applicant had not satisfied section 64.2(3)(b) of the Act, insofar as Board of Governors had not "cease(d) in whole or in part, to provide the services at those premises". Counsel relied upon the evidence before the Board that no bargaining unit work had been lost to Local 506 employees because the shows and events which previously had been located at the Arts, Crafts and Hobbies Building had merely been redirected to other buildings on the site of Exhibition Place. In fact, the uncontradicted evidence before the Board is that the hours of Local 506 employees had not been negatively affected by the lease to Medieval Times of the Arts, Crafts & Hobbies Building.

67. Counsel for the union submitted that the cessation by Board of Governors of the provision of cleaning services at the Arts, Crafts and Hobbies Building satisfied this statutory criterion - that the employer had "ceased to provide physical services at [the] premises" because there are now "less" premises in which cleaning services are performed. Having considered counsel's argument, we disagree with the interpretation of the Act urged upon us by the responding parties. We explain our rationale below.

68. In our view, counsel for the responding parties are correct in their observation that the quantity of bargaining unit work performed by Local 506 employees has not been altered as a result of the redistribution of the shows and events which had previously been located at the Arts, Crafts and Hobbies Building. This does not, however, lead us to conclude that section 64.2(3)(b) of the Act has not been satisfied. Section 64.2(3)(b) of the Act does not speak to the quantity of work performed by the employees on the premises, but rather a partial or total cessation of the provision of services at the premises.

69. In that regard, section 64.2(3)(b) of the Act is open to two distinct interpretations. Counsel for the responding parties suggest that, because the shows and events which have previously been housed at the Arts, Crafts and Hobbies Building are now housed elsewhere on "the premises", being Exhibition Place, Board of Governors has not ceased, in whole or in part, to provide building cleaning services at those premises. This, they submit, is enough for the application to be dismissed. It is possible for such an interpretation of section 64.2(3)(b) of the Act to be adopted. However, another interpretation of that subsection is also possible - that, by ceasing to perform the building cleaning services at the Arts, Crafts & Hobbies Building, Board of Governors has ceased to provide, in part, the previously provided services (i.e. cleaning of the Arts, Crafts, and Hobbies Building) at Exhibition Place.

70. The latter interpretation of section 64.2(3)(b) of the Act seems to us to be a more purposive reading of the legislation, and more consistent with the statutory language. Although initially attracted to the theory espoused by the responding parties, we are of the view that the intention of the Legislature is more fully satisfied by an interpretation of section 64.2(3)(b) which recognizes that the cessation of building cleaning services at one portion of the premises satisfies the statutory criterion whether or not there is a 'redistribution' of similar services at the premises. The specific wording of section 64.2(3)(b) of the Act supports this interpretation. The subsection speaks to the scenario where the employer ceases "in whole or in part" to provide the services. In our view, only part of the services need be discontinued for the subsection to apply.

71. The interpretation of the legislation as urged by the responding parties would, in effect, permit for an employer such as Board of Governors to slowly, over time, delete portions of the applicant's bargaining rights which correspond to particular geographic locations on the grounds of Exhibition Place. Whether an applicant would be successful in challenging such deletions would depend entirely upon the ability of Board of Governors to redistribute the shows or events to other locations throughout "the premises" - namely Exhibition Place. On the theory of the responding parties, should there be excess capacity at Exhibition Place, an application such as the one before us would be unsuccessful. Should there be difficulty slotting the show or event into other buildings, such that the show or event were relocated beyond the grounds of Exhibition Place and this loss of an event or show led to a corresponding partial (or total) cessation of cleaning services, only then would an application under section 64.2 of the Act succeed.

72. We do not believe that this result was intended by the Legislature when enacting section 64.2 of the Act. The adoption of such an interpretation of the Act would result in significant disputes between the parties regarding the various possible reasons for the cessation of services, which is not a particularly useful exercise and which in our view was not contemplated by the Legislature. In the result, we are of the view that the applicant has satisfied the criteria contained in section 64.2(3)(b) of the Act.

(iv) Section 64.2(3)(c) - "Substantially Similar Services"

73. As noted above, the responding parties submitted that, on the facts of the case before us, "substantially similar services" were no longer provided at the premises by another employer as had previously been provided by Board of Governors. In essence, the argument of the responding parties is summarized as follows: The services provided by Medieval Times are different in nature than the services provided by Board of Governors; the Medieval Times castle and arena are different than the Arts, Crafts & Hobbies Building; and the services performed by Medieval Times via After Five are largely performed in the arena which did not previously exist. As a result, the services now provided are not "substantially similar" in nature to those provided previously. Having considered the submissions of all counsel, we are of the view that some of the services previously provided by Board of Governors are now being provided, in a substantially similar form, under the direction of "another employer" as defined by the Act.

74. It is manifest from the language of section 64.2(3)(c) of the Act that it need not be proved by the applicant that identical services are being provided at the premises by the successor employer for section 64.2(3)(c) to be satisfied. All that is necessary is that "substantially similar" services be provided. Whether the services in dispute are "substantially similar" will depend upon the facts of the case. It is also clear from the language of section 64.2(3)(c) that the criterion can be satisfied independently of the nature of the work or services performed by others in the workplace. In other words, if "substantially similar" services are provided in tandem with substantially different services, the statutory criterion may still be satisfied. Such a situation is reflected by this case.

The basic cleaning services which are now performed by After Five employees appear, on their face, to be “substantially similar” in nature to those previously performed by Local 506 members. The other types of cleaning now performed in the Arts, Crafts & Hobbies Building (stable cleaning, for example) were not performed prior to the lease of the Arts, Crafts & Hobbies Building to Medieval Times. However, it is clear that “substantially similar services” are, to some extent, being performed on the site “under the direction of another employer”, namely Medieval Times. This is, in our view, enough to satisfy the statutory test.

75. Dealing specifically with the arguments raised by counsel for the responding parties, it is clear from our conclusion above that the partially different nature of the overall services provided by Medieval Times at the Arts, Crafts & Hobbies Building does not lead to the conclusion that there has been no deemed sale within the meaning of section 64.2 of the Act.

76. The renovations done to the Arts, Crafts & Hobbies Building by Medieval Times, and the construction of the Medieval Times arena, do not, in our view, preclude the conclusion that “substantially similar services” are being provided by Medieval Times at the premises. In this particular case, we are of the view that the existence of renovations to the original building has no real effect on the conclusion we have reached. At the end of the day, building cleaning services of a substantially similar nature are being provided at the premises under the direction of Medieval Times and the structural renovations made by Medieval Times have no effect on that conclusion. The construction of the new arena also does not alter this conclusion. It is true that the After Five employees are performing 80% of their work in the new arena rather than the original building, as renovated. However, in our view this does not preclude the Board from considering this area of the premises for the purposes of determining whether “substantially similar services” have been provided by the possible successor employer. To redistribute the services to an adjacent area which is part of “the premises” as defined by the Act is insufficient to remove the services from our consideration for these purposes.

77. Accordingly, we are of the view that section 64.2(3)(c) of the Act has been established by the applicant, and that the three criteria contained in s.64.2(3) have been proved. In the result, a “sale of a business” is deemed by the legislation to have resulted from Board of Governors to Medieval Times.

(v) Remedy

78. The transaction between Board of Governors and Medieval Times is, by virtue of section 64.2 of the Act, deemed to be a sale of a business “for the purposes of section 64”, and we so declare. We further declare that Medieval Times is bound by the notice to bargain dated February 25, 1993 delivered by Local 506 to Board of Governors.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; July 11, 1994

1. I have had the opportunity to thoroughly examine the basis for the majority ruling in this matter before the Board.

2. The salient facts are accurately reflected in the majority award and this in itself defies comprehension as to how a case under section 64.2 (3) could possibly be established in the circumstances.

3. There is no dispute that:

a. The Board of Governors did lease the Arts and Crafts and Hobbies Build-

ing located within the Exhibition grounds to Medieval Times for an extensive period of time. (para. 4)

b. This lease included adjacent lands upon which Medieval Times constructed a 40,000 square foot arena. (para. 5)

c. Medieval Times did not exercise the option of taking out a contract with the Board of Governors for cleaning services of the Arts and Crafts and Hobbies Building. (para. 10)

d. Arts and Crafts and Hobby shows have been scheduled in other buildings within the Exhibition grounds and the labourers union members perform the cleaning services. There has been no loss of work for bargaining unit members.

e. Tenants and shows often make their own private arrangements with respect to their cleaning requirements. (para. 10)

f. Paragraph 19 clearly established that the union does not have a monopoly to all cleaning that occurs at Exhibition Place.

g. The hours of work of the cleaners in the bargaining unit have not diminished.

4. This award is clearly an extension of the bargaining unit scope, which was not the intent of the legislation. The intent of the legislation was to protect and preserve the scope of the union bargaining rights and the jobs of it's members - nothing more - nothing less.

5. The harm the section was designed to prevent is not present in this case. Instead, this section is being used to extend the union bargaining rights without justification.

6. The majority decision says in fact that a union free tenant moving into a portion of a building to carry on it's business could very well be forced to deal with a union even though its line of business has no resemblance whatsoever to the business that vacated the building to relocate elsewhere and in the process takes with it the certified bargaining agent.

7. It is not presumptuous to assume from this award that in the event Medieval Times leaves the Exhibition grounds for another facility at another location, they will be forced to take the union with them.

8. On the basis of the evidence before this Board, I would have dismissed the application.

1118-94-U International Brotherhood of Electrical Workers' Local 636, Applicant v. Mississauga Hydro Electric Company, Responding Party

Interference in Trade Unions - Intimidation and Coercion - Lock-Out - Strike - Strike Replacement Workers - Unfair Labour Practice - Wearing of union T-shirts in workplace lawful activity protected by Act - Employer's refusal to allow employees wearing such T-shirts to work amounting to lock-out - Employer violating section 73.1 of the Act by using services of other employees in bargaining unit during lock-out - Board directing employer to cease and desist from using services of employees in bargaining unit so long as lock-out continuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

APPEARANCES: *Michael McFadden*, *Harold Vance* and *Rick Wacheski* for the applicant; *R. Budd*, *Ingrid Hann* and *Jo Ann Morello* for the responding party.

DECISION OF THE BOARD; July 6, 1994

1. The title of this proceeding is amended to describe the responding party as: "Mississauga Hydro Electric Company".

2. Having considered the evidence and representations of the parties at the hearing on July 5, 1994, *the majority of the Board (Board Member Ronson dissenting)* is satisfied that, in the circumstances of this case, the wearing of white T-shirts bearing the red lettering "Solidarity Lives IBEW 636" in the workplace was lawful activity protected by the *Labour Relations Act*, which activity the responding employer sought to stop. The responding employer has refused, and continues to refuse, to allow employees wearing such T-shirts to work in an effort to induce or compel them to refrain from exercising their rights under the Act and has therefore locked out the employees, within the meaning of section 1(1) and section 73.1 of the *Labour Relations Act*.

3. The Board is therefore satisfied that the provisions of section 73.1 apply and, further, that the responding employer has breached section 73.1(4) of the Act by using the services of employees in the bargaining unit during the lock-out.

4. The Board therefore declares that:

- (a) the employer has violated section 73.1(4) of the *Labour Relations Act* by using the services of employees in a bargaining unit that is locked-out;
- (b) declares that the responding employer has violated sections 67 and 71 of the *Labour Relations Act*;
- (c) orders the responding employer to cease and desist from continuing to use the services of employees in the bargaining unit that is locked-out for so long as the lock-out continues.

5. The Board reserves its decision with respect to the remaining issues. The Board's decision in that respect, and the Board's reasons herein will follow in writing.

1137-94-M Toronto Typographical Union No. 91-0, Applicant v. **Multipak Ltd.**,
Responding Party

Change in Working Conditions - Interim Relief - Unfair Labour Practice - Remedies - Board directing employer to defer implementation of announced shift/schedule changes pending determination of union's unfair labour practice complaint

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *Douglas J. Wray* and *James Kilpatrick* for the applicant; *Lorenzo Lisi* and *David A. McIntyre* for the responding party.

DECISION OF THE BOARD; July 7, 1994

1. This is an application under section 92.1 of the *Labour Relations Act* requesting interim relief.
2. Having reviewed the parties' material and having heard their representations, we are satisfied, on balance, that interim relief should issue. We hereby direct the responding party to defer implementation of the announced shift/schedule changes until such time as the section 91 complaint in Board File No. 1138-94-U has been determined. We emphasize that this is interim relief only and the question of whether or not the employer has the right to implement said changes is the subject of the section 91 complaint.

CONCURRING OPINION OF BOARD MEMBER J. A. RUNDLE; July 7, 1994

The employer, in the interim, may wish to take up the offer made by the union at the hearing to provide additional weekend coverage in order to meet its production concerns.

3759-93-R Ontario Nurses' Association, Applicant v. **Niagara-On-The-Lake General Hospital**, Responding Party

Certification - Employee - Employee Reference - Practice and Procedure - Parties disputing employee status of Discharge Planning Co-Ordinator - Board in receipt of Labour Relations Officer Report including transcript of examination, plus parties' full written submissions - Board satisfied that matter can be decided on basis of material before it and without further oral hearing

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *J. A. Ronson* and *C. McDonald*.

DECISION OF THE BOARD; July 12, 1994

1. In a decision dated February 21, 1994, the applicant was certified on an interim basis with respect to employees of the responding party employer pending determination of the "employee" status of Anne Howse, Discharge Planning Co-ordinator. Pursuant to that decision, a Board Officer conducted an examination of the duties and responsibilities performed by Ms. Howse, in which the parties were permitted to fully participate and to otherwise adduce evidence

relevant to that matter. A transcript of that examination was prepared and the parties were requested to submit written representations with respect to the Officer's Report. The Board is in receipt of the parties' full and complete submissions in this respect.

2. In its representations the responding party employer requests that a hearing be held before a panel of the Board to permit it to make oral submissions and argument with respect to the Officer's Report. The applicant's position is that such a hearing is unnecessary.

3. The Board appreciates the significance of this matter to the parties. Nevertheless, we have reviewed the materials before us and are satisfied that they would permit us to make a full and fair determination of this matter. In particular, given the careful and detailed submissions that have been provided to us, we are of the view that the hearing of oral submissions in this respect would be unnecessary. Accordingly, the Board shall decide this matter on the basis of the material presently before it and without a further oral hearing.

1190-94-M Office and Professional Employees' International Union, Local 343. Applicant v. Ombudsman Ontario, Responding Party

Change in Working in Conditions - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Union filing unfair labour practice complaint in respect of employee's discharge and in respect of work reorganization and second employee's demotion alleged to violate statutory freeze - Union seeking interim relief pending determination of complaint - Board declining to order reinstatement of discharged employee but directing employer to continue or restore second employee's terms and conditions of employment on interim basis

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *M. I. Rotman*, *C. Dupuis* and *L. Boucher* for the applicant; *Walter Thornton*, *Lee Anderson* and *Laverne Monette* for the responding party.

DECISION OF THE BOARD; July 27, 1994

1. This is an application for interim relief under section 92.1(1) of the *Labour Relations Act* which provides that:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

2. In this application, the applicant trade union seeks the following interim relief:

"That Mr. Dean Morra be reinstated to his position as Administrative Secretary to the Manager of Communications; An Interim Order requiring the Responding Party to cease and desist reorganizing the purchasing department and demoting Wolf Schulz.

In the main application (Board File No. 1191-94-U), the applicant alleges that the responding

employer has violated sections 81.2, 73.1(5), 41(15), 65, 67, 82.1 and 71 of the *Labour Relations Act*, and seeks relief as follows:

An interim Order reinstating dismissed employee Dean Morra; A final Order reinstating the employee, Dean Morra, without loss of seniority or benefits, and recompensing him for any losses; An Order requiring the employer to cease and desist in its pattern of anti-union activities; An Order requiring the employer to cease breaching the freeze provisions of the *Labour Relations Act*; A Declaration that the employer has breached the freeze provisions of the *Labour Relations Act*; A Declaration that the employer has breached Section 73 of the *Labour Relations Act*; Such further and other Order as this Honourable Tribunal may deem just.

3. By decision dated February 5, 1993 (reported at [1993] OLRB Rep. February 147), the applicant was certified as the bargaining agent for:

all employees of Ombudsman Ontario in the Province of Ontario, save and except managers or assistant directors, persons above the rank of manager or assistant director, administrative assistants, administrative secretaries to directors, legislative liaison, students involved in co-operative training programs with a high school, college or university and students employed during the school vacation period.

4. Now, some one and a half years later, the parties are still without a first collective agreement. Although none of the materials filed specifically address the point, it appears that the parties have been through conciliation, and that a lawful strike which took place from May 2nd to 13th, 1994 was brought to an end by an application by the employer for first contract arbitration. The Board was advised that the parties have selected a board of arbitration in that respect but that no date has yet been set for the arbitration itself.

5. In support of its request for interim relief, the applicant argues that it is in a “delicate” situation because the employees which it has represented for approximately a year and a half “have nothing to show for it” and are in a labour relations “limbo”. The applicant submits that it and the employees are concerned about this situation and perceive a pattern of conduct by the employer designed to erode their “positions”. The applicant says that the employees feel vulnerable in their employment, and that it feels that its position as bargaining agent is being threatened. The applicant argues that the interim relief it seeks is necessary in order to restore employee morale and confidence in it as bargaining agent, and to preserve the collective bargaining status quo. The applicant referred to and relied upon the decisions in *Loeb Highland*, [1993] OLRB Rep. Mar. 197; *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. Apr. 358; *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. Mar. 242; *Tate Andale Canada Inc.*, Board File No. 3438-92-M, October 13, 1993, unreported [now reported at [1993] OLRB Rep. Oct. 1019]; *Midas Canada Inc.*, 36 L.A.C. (4th) 349 (Briggs); *Beef Improvement Ontario Incorporated*, [1994] OLRB Rep. April 341, (Application for Reconsideration dismissed June 3, 1994, unreported).

6. The employer argues that the materials filed by the applicant do not provide a sufficient basis for any interim order, and do not demonstrate any need for interim relief. The employer submits that the applicant has failed to pass the “balance of harm” test developed in the Board’s jurisprudence. The employer relies upon the decisions in *Metropolitan Toronto Apartment Builders Association*, [1993] OLRB Rep. Mar. 219 and *Royalguard Vinyl Co., A Division of Royplast Limited*, Board File No. 0940-94-M, June 30, 1994, as yet unreported [now reported at [1994] OLRB Rep. June 775].

7. As the Board observed in *Loeb Highland*, *supra*, section 92.1(1) of the Act gives the Board a new broad discretion to intervene in any proceeding, or intended proceeding, before the Board. It has been described as an addition to the Board’s remedial arsenal (*Tate Andale Canada Inc.*, *supra*). There is nothing in section 92.1(1) which limits its use or suggest that it only be used

in extraordinary cases. On the other hand, neither does it suggest that interim relief is appropriate or should be granted in every case. While interim relief is not an extraordinary remedy within the context of the present legislation, neither is it there just for the asking. On the contrary, section 92.1(1) provides the Board with a labour relations tool which is to be wielded carefully, having regard to the circumstances of each case. It is to be used like a scalpel, not like a hammer or other blunt instrument, in cases in which the Board is satisfied that there are good labour relations reasons for intervening in a labour relations dispute pending the litigation of the merits of that dispute.

8. Because section 92.1(1) is labour relations legislation intended to be used as a labour relations device, a civil litigation approach may provide some guidance, but should not be rigidly applied by the Board (see *Tate Andale Canada Inc.*, *supra*, at paragraph 39). Similarly, when viewed as a whole, the *Labour Relations Act* in this province is unlike labour relations legislation in any other North American jurisdiction. Accordingly, the experience in these other jurisdictions is of limited assistance.

9. The Board's approach to interim relief applications has been to avoid as much as possible prejudicing the merits of the main application (which in the case of an "intended proceeding" may not even be formally before the Board). However, there will inevitably be some connection between the interim application and the main application such that some assessment of at least the apparent merits of the main application must inevitably be made.

10. In the result, a two-pronged "test" has emerged in the Board's interim relief jurisprudence to date. First, assuming the applicant's assertions to be true, is there an arguable breach of the *Labour Relations Act* (or presumably any other legislation with respect to which the Board plays an adjudicative role) for which there is a remedy which the Board is arguably empowered to give? Second, if so, does the balance of *labour relations* harm favour the granting of interim relief?

11. In *Tate Andale Canada Inc.*, *supra*, the Board observed, in paragraph 52, that:

"... where the employer bears the legal onus of establishing that it has *not* contravened the Act, it is hardly surprising that the union request that the "pre-discharged" status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of the employees from the workplace was *not* unlawful, there is nothing counter-intuitive about keeping them there until it does so ..."

(emphasis added)

This comment must be read in the context of the situation before the Board in that case; namely, the discharge during an organizing campaign of employee organizers, and not as a suggestion that the onus in interim proceedings necessarily lies with the party which bears the onus in the main application - which may not even have been brought. There is nothing which absolutely prohibits discharges or layoffs prior to certification, before a first collective agreement, or between collective agreements. Nor is there anything which requires that a discharged or laid off employee must be reinstated on an interim basis in such circumstances.

12. The two-pronged test developed by the Board suggests that at least the initial onus is on an applicant for interim relief to satisfy the Board that interim intervention is appropriate. Consequently, an applicant must plead an arguable or *prima facie* case. This is not a particularly onerous hurdle since an applicant should be able to describe its allegations in a manner which suggests that it may have something to complain about. Further, an applicant must establish that interim relief is appropriate; namely, that it will suffer some substantial labour relations harm unless the Board intervenes pending the disposition of the application it has pleaded on its merits. This is not terri-

bly onerous either, since it only requires an applicant to explain why it seeks interim relief and what labour relations harm will occur if it does not obtain the interim relief it seeks. In determining whether interim relief is appropriate, the Board also looks to the responding party's assertion of harm to see whether there is any countervailing labour relations harm which makes interim relief inappropriate. That is, the Board weighs the respective harms and assesses whether interim relief is appropriate.

13. Because of the wide variety of proceedings and circumstances in which interim relief may be sought, a flexible approach to the two-pronged test is indicated, so that the appropriate labour relations result may be achieved in each case.

14. The nature of interim relief proceedings is such that the Board will not normally hear evidence. Consequently, and because of the natures of the two-pronged test applied by the Board in such cases, it is crucial that the parties file complete pleadings and declarations, which declarations should as much as possible be first hand accounts of matters which are relevant to the Board's considerations. The declarations which the parties must file (pursuant to Rules 86 and 89) should not contain hyperbole, rhetoric or conclusions for which no factual basis is set out.

15. In this case, the applicant filed three declarations in support of its application for interim relief. In paragraph 5 of the application, the applicant pleads that:

The applicant makes the following representations as to why the specific interim order(s) should be made:

The Responding party's activities indicate a pattern of contravention of the *Labour Relations Act*. It is our submission that these contraventions have a demoralizing effect on the bargaining unit. It is further our submission that these activities undermine the confidence the bargaining unit has with its bargaining agent. As a result, the applicant fears with continual coercion of employees and undermining of the bargaining agent, decertification after the first contract is a danger.

In her declaration, Carol Dupuis, the applicant's staff representative assigned to the bargaining unit herein, states that:

Throughout the entire certification and first contract negotiation process, the Employer has resorted to less than scrupulous activities in an attempt to thwart the trust and confidence our members hold in us, their Union.

Nowhere are any particulars provided of the alleged "pattern of contravention" or "less than scrupulous activities" which the Board is asked to conclude, as the applicant has, have had "a demoralizing effect on the bargaining unit".

16. Ms. Dupuis identifies the grievor Mr. Morra as a known supporter of and vocal advocate for the applicant and suggests that the employer discharged him, effective June 28, 1994, in order to undermine the applicant and encourage "decertification" applications. Mr. Morra's declaration deals primarily with the merits of his discharge, although he does offer his conclusion in paragraph 15 (the last paragraph) that he was discharged "... in order to further undermine the morale in the bargaining unit, and that the dismissal was without good faith." Lorraine Boucher's declaration also deals with the merits of Mr. Morra's discharge, and asserts that it was intended to and has had serious, but unspecified, repercussions on morale in the workplace and employee support for the applicant.

17. The Board is satisfied that the materials filed for the applicant do disclose an arguable or *prima facie* case. That is, if the allegations made or implicit in them are properly pleaded and

are proved, or are not disproved by the employer, there has been an arguable breach by the employer of the *Labour Relations Act*, for which one of the remedies may be reinstatement.

18. Moving to the balance of harm, the essence of the applicant's assertion is that Mr. Morra's discharge has seriously affected its support and, concomitantly, its ability to represent the bargaining unit.

19. We recognize, as the Board did in *Morrison Meat Packers Ltd.*, *supra*, that a collective bargaining relationship can be particularly sensitive or fragile in its early stages, and particularly during negotiations for a first collective agreement. However, and as the Board in *Morrison Meat Packers Ltd.* also pointed out, this does not mean that interim relief, including reinstatement of a discharged trade union supporter, will necessarily be appropriate in every first collective agreement situation.

20. In this case, nearly a year and a half has passed since the applicant was certified and there is still no collective agreement between the parties. Nor is one in sight. Other than a bald allegation in the applicant's materials from which it might be inferred that this is all the employer's fault, there is nothing in the materials before the Board which suggests why this is so. There is no indication of when notice to bargain was given, how many bargaining sessions have been held, when the parties met, what problems if any the parties encountered in negotiations, who applied for conciliation and why, what led to the strike, or who applied for first contract arbitration or how that process is proceeding. At the hearing, the Board was advised that the employer applied for first contract arbitration and that an arbitration board has been selected but no hearing date set. In the absence of some other indication, we must assume that both parties share the responsibility for this. Certainly, the first collective agreement arbitration process is not proceeding in the expeditious manner contemplated by the legislation, and there is no indication that either party is pushing it.

21. There is little doubt that the discharge of a trade union supporter is likely to have some impact on the trade union and other employees. It is also likely in this case that Mr. Morra's discharge has caused some discomfiture in the workplace. However, it appears from the applicant's materials, and the representation of counsel that the applicant find itself in the delicate situation because the employees have nothing to show for their support for the trade union, that a significant reason for the erosion in support which the applicant senses is its continuing inability to deliver a collective agreement. It is not apparent from the materials that Mr. Morra's discharge is a significant factor in that respect. Further, the collective bargaining between the parties has been removed from the traditional bargaining table context and has been moved to the interest arbitration table, which is a somewhat less sensitive situation for a trade union, and which also prevents any termination proceedings until the open period of the two year collective agreement which the first collective agreement to arbitration process produces. In the result, having regard to the stage of the collective bargaining relationship, the Board is not satisfied, on the basis of the materials before the Board, that the applicant will suffer a substantial labour relations harm if Mr. Morra is not reinstated to his employment on an interim basis pending the adjudication of his discharge on its merits. On the other hand, the interim relief sought in this case would, if granted, interfere with the responding employer's management of the workplace. An employer continues to have the right to manage the workplace, and the Board will not interfere in that respect on an interim basis unless it is satisfied that there are good labour relations reasons to do so. The Board is not so satisfied in this case.

22. That part of this application is therefore dismissed.

23. We now turn to the application relating to the alleged breach of section 41(15) of the *Labour Relations Act*. It provides that :

(15) If first agreement arbitration is initiated, the rates of wages and all other terms and conditions of employment and all rights, privileges and duties of the employer, the employees and the trade union in effect at the time notice was given under section 14 shall continue in effect or, if altered before first agreement arbitration was initiated, be restored and continued in effect until the first collective agreement is settled unless the parties otherwise agree.

24. The materials before the Board make it very clear that the responding employer has unilaterally decided to alter the terms and conditions of employment of Wolf Schulz, an employee in the bargaining unit, even though this has been the subject of bargaining between the parties.

25. Section 41(15) of the Act is a “freeze” provision, the intent and effect of which is substantially the same as that of section 81(1) of the Act. In an interim relief application in *Beef Improvement Ontario Incorporated*, *supra*, the Board reviewed the purposes and effect of freeze provisions as follows:

15. Section 81 is a strict liability provision in that an employer or trade union need not be improperly motivated for its actions to be in breach of it (see *Beaver Electronics Ltd.*, [1974] OLRB Rep. March 120, *Kodak Canada Ltd.*, [1977] OLRB Rep. Aug. 517). Commonly referred to as a “freeze” provision, section 81(1) of the *Labour Relations Act* prohibits both an employer and the trade union which represents that employer’s employees from altering anything which affects the employment of those employees after an appropriate notice to bargain has been given, unless its collective bargaining partner consents. The purpose of these provisions is to provide a stable point of departure for collective bargaining, thereby facilitating the collective bargaining process, by maintaining the working conditions and circumstances in place when the freeze is triggered. This serves to provide a fixed, though not necessarily static, basis for collective bargaining and operates to preclude the unilateral alteration of any bargainable aspect of the employment status quo which might give one party an advantage in negotiations.

16. Although the “freeze” label has stuck, it may be somewhat of a misnomer. The words of section 81(1) of the Act might be read to mean that there can be no change in anything which affects employment during the specified period. However, the Board has interpreted this provision as operating to preserve the pattern of employment which exists when it comes into effect, rather than specific terms, conditions or other circumstances of employment. Consequently, both the employer and the trade union continue to be entitled to operate within the parameters of the established pattern of employment. (see, for example, *Simpsons Limited*, [1985] OLRB Rep. April 594, *Mohawk Hospital Services Inc.*, [1993] OLRB Rep. Sept. 873).

17. The Board has taken a flexible, and purposive labour relations approach to the statutory freeze under the *Labour Relations Act*. Further, and as the language of section 81(1) itself suggests, there is nothing wrong or even unusual with an employer and trade union negotiating with respect to matters which are subject to the statutory freeze.

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23. The other harm asserted by the applicant is a collective bargaining harm. In the Board’s view, it is not accurate to say that the applicant is seeking to gain an advantage in collective bargaining through this interim proceeding. On the contrary, the applicant seeks to have the collective bargaining positions of the parties restored to what they were at the time of the transfer from the Crown to OSI and BIO respectively. That is what section 81(1) is all about; namely, providing a period during which there is a fixed and stable point of departure for collective bargaining. The scheme of the *Labour Relations Act* recognizes that a change in the terms, conditions or other circumstances of employment by one party can cause harm to collective bargaining position of the other party to a collective bargaining relationship. This is a significant labour relations harm.

24. The responding parties OSI and BIO submitted that this sort of collective bargaining harm

need not be addressed in an interim proceeding and that collective bargaining can proceed, on other issues, pending the disposition of the main application. The Board does not agree. It is true that collective bargaining can take many routes, and that some items can often be bargained before and sometimes without reference to others. However, in the big picture, the starting point for bargaining can have a significant impact on what is given or taken in one area which can in turn affect what is given or taken in other areas. The statutory freeze is just that and it addresses situations which readily lend themselves to interim relief.

In addition, the Board has held that interim relief is appropriate in circumstances where it will serve to neutralize the potential impact of an alleged unfair labour practice or preserve the status quo in order to stabilize a labour relations situation pending the disposition of a dispute on its merits (*J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145 at paragraph 13).

26. That reasoning is equally applicable here, notwithstanding that the parties' collective bargaining differences will be dealt with at arbitration. Arbitration or not, the parties are engaged in the collective bargaining process, and the fixed and stable point of departure is also important at interest arbitration. An alteration of the sort complained of herein may well affect the arbitration process or result.

27. The harm to the applicant in that respect is manifest. On the other hand, the employer has alleged no harm that would result if it was required to either restore Mr. Schulz's terms and conditions of employment what they were when notice to bargain was given (or if it was required not to implement its decision to change those terms and conditions if it is not yet done so) on an interim basis. Nor is it apparent what harm the employer would suffer as a result of being required to continue with a situation which, on the materials, has existed since June, 1988, until the main application is disposed of on its merits.

28. Accordingly, this part of the application is allowed. The responding employer is directed to continue with or restore the terms and conditions of employment in effect for Mr. Schulz in effect at the time notice to bargain was given herein.

0834-94-R; 0835-94-R Primrose G. Short, Applicant v. Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, 1688, Responding Party; Claudette A. Williams, Applicant v. Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, 1688, Responding Party.

Bargaining Unit - Termination - Union representing employees in separate full-time and part-time bargaining units - In previous round of bargaining, employer and union agreeing to combine the two units together with a third bargaining unit in another municipality upon expiry of collective agreement - Group of employees making timely termination application in respect of full-time and part-time units - Board rejecting union's submission that employees required to demonstrate appropriate level of support in combined bargaining unit - Board directing representation votes in full-time and part-time bargaining units

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *F. B. Reaume* and *E. G. Theobald*.

APPEARANCES: Primrose Short and Lois Barclay for the applicants; Robert McKay and Jim Waters for the responding party.

DECISION OF M. KAYE JOACHIM, VICE-CHAIR, AND BOARD MEMBER, F. B. REAUME;
July 12, 1994

1. The style of cause is amended to reflect the correct name of the responding party: “Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, 1688”.

2. These applications are brought pursuant to section 58 of the *Labour Relations Act*. The applicants request declarations that the responding party no longer represents the employees in the bargaining units for which it is currently the bargaining agent.

Background

3. The responding party (also referred to as “the union” or “Retail, Wholesale Canada”) has held collective bargaining rights for the employees at Pharma Plus Drugmarts Ltd. in Orangeville for both full-time and part-time employees since July 7, 1981.

4. In the most recent collective agreements, the recognition clauses for the full-time and the part-time bargaining units are described as follows:

Full-Time Recognition Clause Orangeville

- (1) The Company recognizes the Union as the sole collective bargaining representative for all its Full-Time employees at its Pharma Plus Drugmart Store in Orangeville, Ontario, save and except Store Manager and Assistant Store Manager, persons above the rank of Assistant Store Manager, pharmacists, intern pharmacists and apprentice pharmacists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.
- (2) A person classified as a management trainee is a member of the bargaining unit until such time as the Company advises the Union that the trainee has successfully completed his training which shall be done within a period up to twelve (12) months.

Part-Time Recognition Clause Orangeville

- (1) The Company recognizes the Union as the sole collective bargaining representative for all its Part-Time employees at its Store in Orangeville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except pharmacists, intern pharmacists and apprentice pharmacists.
- (2) A person classified as a management trainee is a member of the bargaining unit until such time as the Company advises the Union that the trainee has successfully completed his training which shall be done within a period up to twelve (12) months.

5. At the time of the application, there were eight full-time and ten part-time bargaining unit employees at the Orangeville store.

6. Retail, Wholesale Canada has maintained a collective bargaining relationship with Pharma Plus Drugmarts Ltd. in the Regional Municipality of Ottawa-Carleton since 1961. At the time of the application, there were approximately 290 bargaining unit members covered by the Ottawa-Carleton collective agreement.

7. The most recent collective agreement for the Ottawa-Carleton employees contains the following recognition clause:

Recognition Clause Ottawa/Carleton

- (1) The Company recognizes the Union as the exclusive representative and sole bargaining agent for all employees at its Retail Stores in the Regional Municipality of Ottawa Carleton, save and except Store Managers and persons above the rank of Store Manager, graduate and under-graduate Pharmacists including Pharmacy Interns and Apprentice Pharmacists, and Clerical Administrators assigned to the Regional Office.
- (2) A person classified as a Management Trainee is a member of the bargaining unit until such time as the Company advises the Union that the trainee has successfully completed his training which shall be done within a period up to 12 months for Management Trainees not formerly in the bargaining unit and up to six months for Management Trainees coming formerly from the bargaining unit.

8. The Orangeville store has separate collective agreements for its full-time and part-time units, although historically, the collective agreements were jointly bargained. The Ottawa-Carleton stores have a master collective agreement covering both full-time and part-time employees. In each instance, the expiry date of these collective agreements is June 4, 1994.

9. At the conclusion of bargaining for the 1992-1994 Orangeville collective agreements, a membership meeting for full-time and part-time bargaining unit members was held on November 30, 1992. At that time, a Memorandum of Settlement was ratified by the membership. Attached to the Memorandum of Settlement was a Memorandum of Agreement dated November 12, 1992 between Pharma Plus Drugmarts Limited and Retail, Wholesale Canada, the full text of which is included below:

Whereas the Company and the Union are parties to collective agreements covering both full-time and part-time employees in Orangeville and in the Regional Municipality of Ottawa-Carleton.

And Whereas the Company and the Union desire having one collective bargaining relationship with respect to the employees covered by these collective agreements. Therefore, the Company and the Union agree as follows:

- 1) The Orangeville collective agreement shall be terminated upon its expiry on 4 June 1994.
- 2) Upon the termination of the Orangeville collective agreement the Company shall grant the Union recognition as the bargaining agent for the full-time and part-time employees of the Orangeville store in the Ottawa-Carleton collective agreement.
- 3) From 4 June 1994 and thereafter there shall be one collective bargaining relationship and one collective bargaining agreement covering all employees of the Regional Municipality of Ottawa-Carleton and Orangeville.
- 4) Upon entering into negotiations for the renewal of the Ottawa-Carleton collective agreement the parties shall negotiate and discuss any differences arising out of the consolidation of these two bargaining units and collective agreements.

10. On March 14, 1994 the union served the employer with notice of its desire to negotiate a new collective agreement.

11. On June 4, 1994 both Orangeville collective agreements expired, as did the Ottawa-Carleton collective agreement and the above-mentioned Memorandum of Agreement came into

effect. On Monday, June 6, 1994 the applicants filed two applications to terminate the union's bargaining rights with respect to the full-time and the part-time Orangeville bargaining units. Also on June 6, a membership meeting of the Orangeville bargaining units was held to discuss collective bargaining proposals and to elect a negotiating committee for the next round of negotiations. The union and the employer have held one day of negotiations, after which negotiations broke down. As of the date of the hearing, the union had not yet entered into a new collective agreement with the employer.

Preliminary Motion

12. As stated previously, the applicants filed two applications, one in respect of each of the full-time and part-time Orangeville bargaining units. They filed one petition containing the signatures of the eight full-time bargaining unit members and the ten part-time bargaining unit members. The union took the position at the outset that, as a result of the Memorandum of Agreement dated November 12, 1992, the three separate bargaining units (full-time Orangeville, part-time Orangeville, all-employee Ottawa-Carleton) had been combined into a single unit effective June 4, 1994. The union argues that, even if the signatures on the petition are voluntary, the applicants have not demonstrated support of forty-five per cent of the employees in the *combined* bargaining units. The union requested that the applications be dismissed without a hearing.

13. The applicants responded that their understanding of the Memorandum of Agreement was that it meant that the three units would sit down and discuss jointly negotiating a collective agreement in 1994. They noted that the Memorandum of Agreement was not incorporated into the collective agreements signed subsequent to the Memorandum of Settlement. The union conceded that the Memorandum of Agreement was not incorporated into or attached to the collective agreement, but argued that that was an oversight.

14. The panel ruled orally at the hearing (Board Member Theobald dissenting) that it would proceed to hear the merits of the termination application. These are the reasons of the majority of the panel for rejecting the union's preliminary motion.

15. The applicable provisions of the Act are sections 58(2)(a) or (c) and 58(3), which read as follows:

58.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit, [emphasis added]

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • •

- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j.1) that they no longer wish to be represented by

the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

16. The union has argued that as a result of the Memorandum of Agreement, the bargaining units have been combined effective June 4, 1994, and a termination application brought after that date must be brought with respect to the combined unit.

17. The majority of the panel does not agree that the effect of the Memorandum of Agreement is to bar an application under section 58(2) with respect to the full-time and part-time Orangeville bargaining units. It appears to the panel that the result of the Memorandum of Agreement is that the employer has agreed to combine the three bargaining units effective June 4, 1994. However, this agreement has not yet been incorporated into a collective agreement.

18. Section 58(2) refers to employees in the bargaining unit *defined in a collective agreement*. The “bargaining unit” referred to in 58(3) is, by implication, also the *bargaining unit defined in a collective agreement*. Therefore, the “bargaining unit” for which an application to terminate bargaining rights may be brought (under 58(2)), and for which the Board must determine the number of employees (under 58(3)) is the bargaining unit *defined in a collective agreement*. In *International Union of Doll & Toy Workers of the U.S.A. and Canada, Local 905*, [1977], OLRB Rep. Aug. 534, the Board stated:

5. The representative of the employer requested that the Board apply this application not only to the bargaining unit referred to above, but also to a second bargaining unit for which the respondent possesses bargaining rights. This request was based upon the fact that since 1973 negotiations for both bargaining units have been carried on simultaneously and that the terms of the resulting collective agreements have been identical. At the hearing the Board indicated it could not accede to the employer's request. Section 49(2) of the Act stipulates that any of the employees “in the bargaining unit defined in a collective agreement” may apply for a declaration that the trade union no longer represents the employees “in the bargaining unit”. By implication it is the bargaining unit defined in the collective agreement which is also “the bargaining unit” referred to in subsections (3) and (4) of section 49. Having regard to these statutory provisions, it is incumbent upon the Board to concern itself only with the bargaining unit defined in the relevant collective agreement.

19. For the purpose of these applications under section 58(2), the bargaining units *defined in the collective agreements* were the full-time and part-time Orangeville units described in paragraph 4 above. Therefore, the applicants were entitled to bring their separate applications with respect to the full-time and part-time Orangeville bargaining units.

20. The panel wishes to emphasize that its conclusion with respect to the effect of the Memorandum of Agreement is confined solely to the effect on the applicants' right to bring a termination application pursuant to section 58(2) of the Act.

21. In the result, the panel decided to hear the merits of the application.

Voluntariness of the Petition

22. In an application under section 58(2), the onus is on the applicant to satisfy the Board that not less than forty-five per cent of the employees in the bargaining unit have *voluntarily* signified in writing that they no longer wish to be represented by the trade union. In order to satisfy this onus, the Board generally requires evidence with respect to the origination, preparation and circulation of the petition.

23. Primrose Short, one of the applicants, gave evidence with respect to the circulation of

the single petition containing the signatures of both full-time and part-time bargaining unit members. Ms. Short testified that as early as October 1993, the bargaining unit members at the Orangeville store began discussing their dissatisfaction with the union. In late May 1994, members discussed the possibility of decertifying the union. Ms. Short contacted the Labour Relations Board and requested the appropriate applications. On June 1, Ms. Short met with three other bargaining unit members, Lois Barclay, Shelly Lawson and Claudette Williams, at Tim Horton Doughnuts in Orangeville to discuss decertifying the union. This meeting was prompted by a notice of a membership meeting to be held on June 6 to discuss amendments to the collective agreement. The employees decided to hold their own meeting to discuss whether to proceed with the collective bargaining process or to apply for decertification. They decided to hold a meeting at the home of Lois Barclay on Sunday, June 5. They made up a list of employees and divided the list amongst themselves; each of them contacted some of the employees to advise them of the meeting at Lois Barclay's house.

24. Prior to the meeting, Ms. Short, Ms. Barclay and another bargaining unit member, met and drafted the petition. Ms. Short testified that she remembered the wording which was required because she had attended a prior decertification application hearing in 1990 (in which, incidentally, she had opposed the decertification application). In any event, based on that previous experience, she drafted the heading to the petition.

25. On the evening of June 5, approximately thirteen bargaining unit members met. Ms. Short opened the meeting with a discussion inquiring whether the members were happy with their union representation. There was a thirty-minute discussion in which the bargaining unit members overwhelmingly voiced their dissatisfaction with the union. Ms. Short advised the members that if they were unhappy with the union and wished to decertify, they could sign the petition which was located on the table at the front of the room beside her. At that point, coffee was served and there was discussion amongst the members. During the meeting, twelve of the thirteen bargaining unit members present signed the petition in the presence of Ms. Short.

26. At the end of the evening, Ms. Short left Ms. Barclay's house and proceeded to the home of Claudette Williams, where she contacted Employee No. 13 and advised her what had transpired. Employee No. 13 indicated that she would like to sign and Ms. Short proceeded to her home and witnessed her signature. Upon her return to Ms. Williams' house, Employee No. 14 (who had previously been at the meeting at Lois Barclay's house) attended at Ms. Williams' house and signed the petition in the presence of Ms. Short. Employee No. 15 contacted Ms. Short at Ms. Williams' house and indicated that she would like to sign the petition. Ms. Short attended at her home and witnessed the signature of Employee No. 15 on the petition. Ms. Short took the petition home with her on the evening of June 5.

27. The next morning, June 6, Claudette Williams came to Ms. Short's home. Ms. Williams visited Employees Nos. 16, 17 and 18 and obtained their signatures. As there was no direct evidence by Ms. Williams as to the obtaining of those signatures, the Board will not consider them.

28. When Ms. Williams returned with the signatures of Employees Nos. 16, 17 and 18, Ms. Short took the petition, made the appropriate number of photocopies, and mailed the petition directly to the Labour Relations Board.

29. In light of the above evidence, the Board is satisfied that not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union.

30. The Board directs that two representation votes be taken in respect of the employees in

the bargaining units described in paragraph 4 above. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the employer.

31. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER E. G. THEOBALD; July 12, 1994

1. Board Member, E. G. Theobald, concurs in the result of the decision.

2933-92-M; 3316-92-R The Hospitality, Commercial and Service Employees Union, Local 73, Trade Union v. 967105 Ontario Limited c.o.b. **Sanfords Roadhouse Restaurant**, Employer; The Hospitality, Commercial & Service Employees Union, Local 73, Applicant v. 967105 Ontario Limited, c.o.b. as Sanford's Roadhouse Restaurant, Responding Party

Reference - Sale of a Business - Union representing predecessor hotel's employees alleging sale of a business - Board satisfied that alleged successor purchased certain assets from predecessor, but that ongoing enterprise not transferred - Board finding that predecessor operated hotel business and that alleged successor operating restaurant business and acting as landlord - Board finding no sale of business - Board advising Minister that alleged successor not bound by predecessor's collective agreement with union

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

APPEARANCES: *W. Dubinsky*, *Don Campbell*, *Linda Ritchie* and *Lenore Ritchie* for the applicant; *David Sandy Sellers* for the responding party.

DECISION OF THE BOARD; July 15, 1994

1. The name of the responding party in Board File No. 3316-92-R is amended to read: "967105 Ontario Limited, c.o.b. as Sanford's Roadhouse Restaurant".

2. Board File No. 2933-92-M is a Ministerial Reference under section 109 of the *Labour Relations Act* and Board File No. 3316-92-R is an application under section 64 of the Act.

3. The Hospitality, Commercial and Service Employees Union, Local 73 ("Local 73") claims that 967105 Ontario Limited c.o.b. as Sanford's Roadhouse Restaurant ("Sanford's") is bound to a collective agreement with Local 73 as a result of it having purchased the business of 510412 Ontario Inc. c.o.b as the Waverly Hotel ("the Waverly Hotel"). Local 73 applied to the Minister for the appointment of an arbitrator pursuant to section 46 of the Act. Sanford's denied that it is a successor employer and also denied that it is bound to a collective agreement with Local 73. The Minister referred the following question to the Board for its advice:

Is Sanford's a successor employer and therefore bound by the collective agreement between the union and the Waverly Hotel?

4. By decision dated January 22, 1993, the Board (differently constituted) directed Local 73 to file with the Board an application under section 64 of the Act. This direction was made to ensure that all interested persons were given notice of the sale dispute and to ensure also that the pleadings one would expect in a sale case were filed by the parties. Local 73 filed its application on February 15, 1993 and it was given Board File No. 3316-92-R. The central issue in both matters before us is whether there was a sale of a business from the Waverly Hotel to Sanford's.

5. The Board held a number of days of hearing over a period of time in Thunder Bay to entertain the evidence and representations of the parties. Mr. S. Sellers, the owner of Sanford's, called nine persons to give evidence. Counsel for Local 73 called three persons to testify. In making its factual determinations, the Board has carefully reviewed the oral and documentary evidence and the submissions relating thereto.

6. Ed Durand owned the business of the Waverly Hotel and operated the business out of leased premises located at 54 North Cumberland Street, Thunder Bay. The Waverly Hotel was licensed to sell beer and liquor and rented rooms. As required by its liquor license, it also provided food to its customers. For a number of years, Local 73 represented all bartending and beverage service persons working in the beverage rooms of the Waverly Hotel. In April, 1991, Local 73 successfully applied to the Board for a certificate to represent other employees working at the Waverly Hotel. In August of 1991, the parties amended the collective agreement to cover the recently certified employees. It appears from the evidence that the additional employees were not great in number and that the six full-time and some part-time personnel working in the beverage rooms constituted the core of the bargaining unit.

7. Between February 1991 and May 1991, the members of Local 73 working at the Waverly Hotel engaged in a strike. It appears that the strike was the beginning of the end of the Waverly Hotel. During the strike, Saw Man Inc., which is owned by John Sawchuk, loaned Ed Durand a significant amount of money and got the shares of the Waverly Hotel as security. In October 1991 it was evident to Mr. Sawchuk that he would not get paid. On October 22, 1991 Saw Man Inc. took possession of the Waverly Hotel and its assets. Sawchuk closed down the business and laid off the employees. Sawchuk hoped to re-open the business in a couple of weeks but this never occurred. Since the Waverly Hotel had a lease purchase agreement, Saw Man Inc. bought the building in December, 1991. Under a power of sale, Saw Man Inc. advertised the sale of the business and the building. Mr. Sawchuk testified that four or five different individuals expressed an interest in purchasing the business of the Waverly Hotel. All of them eventually declined because of the presence of the collective agreement with Local 73. In the Thunder Bay area, it appears that the collective agreement between Local 73 and the Waverly Hotel provided better remuneration and other terms than existed at other unionized hotels. Mr. Sellers was one of the persons interested in buying the business of the Waverly Hotel.

8. Mr. Sellers is a carpenter by trade who operated a small contracting company. Mr. Sellers would buy properties, renovate them and then either rent or sell them. Mr. Sellers' wife, K. Corrigan, has experience in the food service industry. Sellers and his wife were interested in obtaining a business in which they could both work. Sellers noticed the advertisement in a newspaper for the Waverly Hotel and contacted Mr. Sawchuk. Ms. Corrigan's mother lives with Mr. Sawchuk. After speaking with Sawchuk about the situation and being told about a "union problem", Mr. Sellers contacted Mr. Campbell, Local 73's president and business manager. Campbell advised Sellers that he was interested in getting the business opened. Sellers was particularly interested in Campbell's views on whether Sellers and his wife could work in the business since the collective agreement is very restrictive when it addressed management working. Campbell expressed the view that it was management's job to manage and not to work. Campbell provided Sellers with a

copy of the Wayland Hotel agreement which was not as "rich" and did not restrict management from working in the business. Subsequent to meeting with Campbell, Sellers entered into an agreement to purchase the business of the Waverly Hotel. The primary focus was on the building but he felt it might be possible to successfully revive the business of the Waverly Hotel after carrying out some minor renovations. The agreement provided for the purchase of the building, goodwill, the right to use the name Waverly Hotel and all licences necessary to operate the business. As a condition precedent in the agreement, the vendor and purchaser were to make reasonable efforts to amend the existing collective agreement or to enter into a new collective agreement upon terms satisfactory to the purchaser and similar to the terms of the Wayland Hotel collective agreement.

9. The agreement of purchase and sale was executed on February 3rd, 1991. Sawchuk set up a meeting for the following day between himself, Sellers, Campbell and union members who had worked at the Waverly Hotel. It is not necessary to detail the discussions at this meeting other than to note that Campbell was not prepared to alter the terms of the existing collective agreement. Sellers prepared an offer to Local 73 based on the Wayland Hotel agreement which he sent to Campbell and some of Local 73's members. Sellers was prepared to buy the business of the Waverly Hotel but in his view the business would not be viable unless he obtained some changes to the collective agreement. Most importantly, he felt that the business could not succeed unless he and his wife were able to work in the business. Sellers testified that he did not receive any response from Campbell to his proposal. Sellers believed that a number of employees were prepared to alter the collective agreement but he felt that Campbell was not prepared to let the members decide the issue. This caused Sellers to write to his member in the Provincial Legislature and the Minister of Labour to obtain some assistance. Since the condition precedent relating to the alteration of the existing collective agreement had not been met the sale was not completed. Even if the condition precedent had been resolved, it is not entirely clear that the sale would have been completed since Sellers indicated there may have been difficulty obtaining financing because the bank was not convinced that the business was a good risk. Mr. Sawchuk invited Campbell to find someone who was prepared to buy the business but Mr. Campbell apparently was not successful in directing anyone to Mr. Sawchuk.

10. As a member of the carpenters union for many years, Sellers had some difficulty in understanding why he and Local 73 could not reach an accommodation. In order to educate himself concerning labour relations matters, he did some research. He read a labour relations text by Sack and Mitchell and the Labour Relations Board Reports. He learned that the bargaining rights attached to the business. Since he and his wife were not able to work in the business of the Waverly Hotel, he considered simply buying the building and premises which was his primary focus in any event. On March 23, 1992, Sellers made an offer to purchase the land and building known as 54 North Cumberland Street. He offered to pay \$351,000 which was approximately \$40,000 less than what he had previously offered to pay for the business. With this offer, Sellers did not purchase the right to use the name of the Waverly Hotel, nor the goodwill. None of the licenses previously held by the Waverly Hotel, including the liquor license, were transferred to Sanford's. Although the sale included all fixtures and all chattels located at the property, it did not include any inventory. No rental contracts were transferred and no relationship with suppliers was maintained with Sanford's. Sellers purchased the building and premises with a view to starting a restaurant business. Sellers obtained possession on May 1, 1992 and the deal closed on May 5, 1992.

11. Once he gained possession, Sellers carried out extensive renovations on the building. Sellers testified that the value of the renovations he undertook was approximately \$300,000. The Board heard considerable evidence relating to the nature and extent of the renovations which we find unnecessary to detail. Suffice it to say that much of the main floor was gutted and the renovations that were made were intended for a restaurant environment including an adequate kitchen

facility. The kitchen area was expanded considerably and modernized. Although the purchase included the existing chattels, Sellers found that there was very little that was of any use to Sanford's business. On August 10, 1992 Sanford's purchased the goods and chattels of an O'Tooles restaurant. In addition, new goods were purchased. It was the new goods and the goods and chattels obtained from O'Tooles which became central to the operation of Sanford's business. The former men's side lounge is where the present restaurant is located. Only a small portion of the other lounge is being utilized by Sanford's. The remaining 1,800 square feet has been listed for rent with a real estate agent. In addition to the main floor Sellers carried out significant renovations on the floors where the rooms are located.

12. Mr. Sellers opened for business on November 9th, 1992 approximately thirteen months after Mr. Sawchuk closed the business of the Waverly Hotel. After six months of renovations, Sellers opened up a restaurant which is now the focus of the business activity on the premises. He hired a manager who had training and experience in restaurant management. Sellers advertised for staff and provided the employees he hired with the training needed to work in a restaurant operation. Only one of the employees who had worked at the Waverly Hotel applied for employment at Sanford's. This person was hired and provided with the necessary training. Mr. Sellers testified that he understood that Mr. Campbell advised the former Waverly Hotel employees not to apply for jobs at Sanford's since they would all be returning to work as a group. The focus of the restaurant business is to attract people to come for lunch and dinner. Sanford's also provides a catering service and had catered an event with 150 people.

13. Thus far we have briefly described the aspects of the business of the Waverly Hotel and the business of Sanford's. The parties called a number of witnesses to testify about the nature of each business, particularly the business of the Waverly Hotel at various periods during its history. The focus of the evidence was on the extent to which each business provided its customers with food and drink. It is unnecessary to set out all of this evidence. A review of the evidence before us leaves one with the following picture of each business.

14. The Waverly Hotel operated a typical hotel operation. It rented rooms to guests for varying periods of time. It appears that some guests at the Waverly Hotel were employees who worked at the Hotel and were provided with a room as part of their compensation. Entertainers were provided with rooms while they were engaged to provide entertainment at the Waverly Hotel. Persons renting or otherwise occupying rooms were not permitted to cook. They were supplied with bedding and their rooms were cleaned for them. No more than one person was employed by the Waverly in connection with the rental of rooms. The focus of the business was clearly on the sale of beer and liquor and the provision of entertainment. The evidence suggests that the Waverly Hotel was well-known for the bands it employed to attract thirsty patrons. Prior to closing, the music was country and western and before that it was rock and roll. At other times, the Waverly Hotel showed movies and provided other forms of entertainment in order to attract customers. As noted earlier, the Waverly Hotel provided food for its customers and was required to do so as a condition for maintaining its liquor licence. Although there was a dispute concerning the extent of the food services provided, the Board is satisfied that the main focus of the business of the Waverly Hotel was not in providing food to customers. Customers of the Waverly for the most part went there to drink and to be entertained with live entertainment. Customers did not go there to eat, although some might very well order food while on the premises. It appears that the Waverly Hotel contracted out the provision of food services and that this aspect of its operation was not a primary revenue source if it was a revenue source at all. In the last months of its operation, it appears that very little revenue was generated from the sale of food or the rental of rooms.

15. After completing the renovations, Mr. Sellers rents the rooms as residential premises

under the *Landlord and Tenant Act*. He collects the first and last month's rent and asks for a security deposit. A fridge and microwave are supplied with each room and cooking is permitted. Tenants have access to a coin operated washer and dryer. Tenants clean their own rooms and supply their own bedding. Sanford's applied for and obtained a new liquor license and it obtained a license to provide food services from the City of Thunder Bay. As noted earlier, the focus at Sanford's is on the provision of food to customers. However, as one might expect, the revenue generated from liquor sales is greater than that generated by the sale of food. Sanford's does not provide live entertainment but it does provide televisions, video tables and various other games for its customers.

16. The relevant portions of section 64 of the Act are as follows:

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

"successor employer" means an employer to whom the predecessor employer sells the business. ("employeur qui succède")

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

• • •

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

17. In support of its position that no sale occurred, Mr. Sellers relied on *Thunder Bay Golden Nugget Salon*, [1991] OLRB Rep. July 918. Counsel for Local 73 referred us to the following decisions: *Doyle's Tavern*, [1984] OLRB Rep. Dec. 1700; *Krush*, [1987] OLRB Rep. Jun. 859, and *Accomdex Franchise Management Inc.*, [1993] OLRB Rep. Apr. 281.

18. Board decisions have interpreted and applied the sale provisions to various fact situations. For our purposes, we will refer to some brief comments contained in a few decisions. In *Crown Packers & Realities Ltd.*, [1988] OLRB Rep. Aug. 752, the Board outlined the nature of the issue as follows:

38. As is usual in this type of case, although we have no difficulty in finding that the predecessor RDM has disposed of "something" to the respondents, it is more difficult to determine if the sale of that "something" constitutes a sale of a "business". Once again we note that in the past the Board has given a broad and liberal interpretation of the term "business". As the Board noted in the *Metropolitan Parking Inc.*, case:

A business is a combination of physical assets and human initiative. In a sense it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets.

In that particular case the Board focused on whether the purchaser had acquired a “functional economic vehicle”.

39. Similarly, a “part of the business” must be a functional vehicle. The sale of “part” of a business must be more than simply sale of a part *used* in the operation of the business and must be a transfer of part of the operation itself. A “coherent and severable part” or a “discrete, cohesive portion” of the predecessor’s economic organization sufficient to enable the successor to perform a discrete, definable part of the functions formerly performed by the predecessor employer must be transferred. To hold otherwise would mean that each disposition of isolated elements of the business would result in a finding under section 63 of the Act.

Most of the cases under section 55 [now section 63] involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words “part of a business”. Yet those words pose much more difficulty than the term business itself. Almost anything actually traceable to the predecessor could be regarded as “part” of its business. But it could not have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept this view, would make section 55 the vehicle for extending rather than preserving bargaining rights.

(See *Vaunclair Meats Limited*, *supra*, at paragraph 25).

40. After reviewing a number of decisions the Board went on the state:

In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization, managerial or employee skills, plant, equipment, “know how” or goodwill, thereby allowing the successor to perform a definable part of the economic functions [formerly] performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union’s right to bargain about them, were preserved. The part of the predecessor’s business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor’s configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement.

19. In *Miracle Food Mart, Steinberg Inc.*, [1988] OLRB Rep. July 679 in paragraph 20 the Board stated:

20. In dealing with section 63 applications, the Board has traditionally accorded a liberal meaning to both the term “business” and “sells”. The Board has recognized section 63 is intended to provide some stability and permanence to collective bargaining rights, to insulate those rights from the vagaries of commercial transactions where the enterprise continues, at least in part. Whether a particular commercial transaction constitutes the “sale” of a “business” or “part of a business” is a factual determination reflecting the totality of the specific circumstances. Various indicia have been noted in the jurisprudence including, the nature of the work, location, physical assets, managerial expertise, goodwill, company name, customer lists, accounts receivable, inventory, restrictive covenants, and hiatus in the operation. Moreover, it has been acknowledged that particular configurations of factors leading to a conclusion that a “sale” has occurred may differ considerably from industry to industry or between sectors of the economy. In any specific instance, the Board must determine whether what has been transferred is merely a collection of assets or an ongoing enterprise (or, at least, a distinct and severable segment of that ongoing enterprise). ...

20. In his argument, counsel for Local 73 submitted that the facts support the conclusion that Sanford’s purchased the business of the Waverly Hotel and he also suggested that the sale transaction was unsuccessfully structured in order to avoid Local 73’s bargaining rights. Although perhaps not terribly relevant, it is difficult to conclude from the evidence that Mr. Sellers’ objec-

tive was to avoid inheriting Local 73's bargaining rights. Mr. Sellers was prepared to purchase the business of the Waverly Hotel and enter into a bargaining relationship with Local 73 as long as he and his wife could work in the business. In his view, the chances of operating a viable business was unlikely unless he and his wife could work in it. Mr. Sellers was quite prepared to be bound to a collective agreement similar to the Wayland Hotel collective agreement. Local 73 determined it could not alter the terms of the collective agreement it had with the Waverly Hotel. From its perspective, Local 73 may have had sound reasons for taking this position and we are not in a position to be critical of it for the decision it made. However, circumstances do not suggest to us that Mr. Sellers' motivation was in avoiding Local 73's bargaining rights. His goal was to purchase an asset and start a business in which he and his wife could work. As he testified, it became clear to him that that business was not going to be the business of the Waverly Hotel.

21. Was there a sale of a business from the Waverly Hotel to Sanford's? As it has often noted, the Board is required to carefully review the facts in each case and determine whether a sale has occurred. We have no difficulty in accepting the principles of those cases referred to us by counsel for Local 73 but note that the facts in those cases are different from the facts before us. In the "*tavern*" cases relied upon by Local 73, the purchaser operated a tavern after the transaction, even if there was a hiatus in the operation, and it appears to be of some significance that the liquor licence was transferred from the vendor to the purchaser. In the *Accomodex* case, which represents a useful review of the Board's jurisprudence, the purchaser bought the lands, buildings and most of the tangible assets of the predecessor employer. Although there was a hiatus of 14 months, the purchaser used the core assets to operate the business of a hotel with jobs that were essentially the same as those in the predecessor's business. Based on the facts before it in those cases, the Board concluded that there had been the sale of a business.

22. Sanford's purchased the land and the building that were firmly a part of the business of the Waverly Hotel. It also purchased some chattels but the evidence suggests that not many chattels were utilized by Sanford's and those chattels that were used required refurbishing. No goodwill transferred to Sanford's nor did it purchase the name the Waverly Hotel. Accounts receivable, inventory, necessary licences and managerial expertise were not transferred to Sanford's. There was a thirteen month hiatus from when the business of the Waverly Hotel closed and when Sanford's started operating. The renovations that were performed on the main floor were designed for purposes of operating a restaurant and were not completed to simply upgrade or modernize the premises. Even the rental of rooms is now done in quite a different way than previously. In order to carry on with its business, Sanford's was required to purchase new goods as well as the goods and chattels of an O'Tooles restaurant. It is the purchase of these assets which were critical to the operation of Sanford's business. Although not entirely dissimilar, the evidence suggests that the jobs performed by Sanford's employees require some different skills than those of the employees of the Waverly Hotel. Although each of these factors by themselves is not determinative, they do tend to point to the conclusion that no sale of a business occurred between the Waverly Hotel and Sanford's.

23. In essence, the position of Local 73 is that Sanford's business consists of the provision of food, drink, entertainment and the rental of rooms to its customers which was essentially the business of the Waverly Hotel. Although certain elements may be common to different businesses, this does not lead one to conclude that they are the same business. The focus of the business of the Waverly Hotel was on high volume beer and liquor sales with live entertainment. The primary focus of Sanford's is on the sale of food to customers who hopefully will also have a drink. The Waverly Hotel operated a hotel business and Sanford's operates a restaurant business and acts as a landlord. The evidence supports assertions of some of the witnesses who testified that in looking at both operations it would be clear that there were two distinct businesses. From the evidence before

us, the Board is satisfied that certain assets were transferred from the Waverly Hotel to Sanford's but that an ongoing enterprise was not transferred.

24. As noted earlier, the employees who previously worked at the Waverly Hotel have considerable seniority. Many of them have expectations of securing employment with Sanford's at a time when obtaining other employment may be problematic. In dealing with this application, the Board recognized that these practical employee interests are not insignificant. However, after reviewing the particular facts of this case and the submissions, the Board finds that there was no sale of a business between the Waverly Hotel and Sanford's Roadhouse Restaurant.

25. Accordingly, the application in Board File No. 3316-92-R is dismissed. With respect to Board File No. 2933-92-M, the Board advises the Minister that Sanford's is not a successor employer and is not bound by the collective agreement between Local 73 and the Waverly Hotel.

2546-93-U Ontario Nurses' Association, Applicant v. The Board of Governors of the Belleville General Hospital, Responding Party

Change in Working Condition - *Hospital Labour Disputes Arbitration Act* - Unfair Labour Practice - ONA alleging that hospital employer violating statutory freeze by granting non-bargaining unit staff one extra week of vacation entitlement and refusing to extend that benefit to ONA bargaining unit members still without first collective agreement - Board applying "reasonable expectations" test - Application allowed - Employer directed to grant bargaining unit employees same compensation package granted to non-bargaining unit employees

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *Jennifer Webster*, *Elizabeth Dewar*, and *Kathleen Sarty* for the applicant; *Kees Kort*, *Gary Williams*, *E. Temple*, and *P. Bement* for the responding party.

DECISION OF THE BOARD; July 26, 1994

1. The correct name of the responding party is "The Board of Governors of the Belleville General Hospital".

2. This is an application filed under section 91 of the Act alleging that the responding party has violated section 13 of the *Hospital Labour Disputes Arbitration Act* (hereinafter also referred to as "HLDAA") and sections 65, 81, and 81.1 of the *Labour Relations Act*. The applicant alleges that in granting non-bargaining unit staff one extra week of vacation entitlement, and in refusing to extend that benefit to the applicant's bargaining unit members who are without a first collective agreement, the responding party has violated the HLDAA and the *Labour Relations Act* by changing working conditions during the statutory "freeze" period.

3. For ease of reference the section of the *Hospital Labour Disputes Arbitration Act* referred to by the applicant is set out below:

13. Despite subsection 81(1) of the *Labour Relations Act*, where notice has been given under section 14 or 54 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees

and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated. R.S.O. 1990, c. H.14, s.13.

The relevant sections of the *Labour Relations Act* are as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,
 as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 54 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 45 applies with necessary modifications thereto.

81.1-(1) This section applies with respect to employment benefits, other than pension benefits, normally provided directly or indirectly by the employer to the employees.

(2) This section applies only when it is lawful for an employer to lockout employees or for employees to strike.

(3) For the purpose of continuing employment benefits, including coverage under insurance plans, the trade union may tender payments sufficient to continue the benefits, to the employer or to any person who was, before a strike or lock-out became lawful, obligated to receive such payments.

(4) The employer or other person described in subsection (3) shall accept payments tendered by the trade union under that subsection and, upon receiving payment, shall take such steps as may be necessary to continue in effect the employment benefits including coverage under insurance plans.

(5) No person shall cancel or threaten to cancel an employee's employment benefits including coverage under insurance plans if the trade union tenders payments under subsection (3) sufficient to continue the employee's entitlement to the benefits or coverage.

(6) No person shall deny or threaten to deny an employment benefit, including coverage under an insurance plan, to an employee if the employee was entitled to make a claim for that type of benefit or coverage before a strike or lock-out became lawful.

(7) Subsections (4), (5) and (6) apply despite any provision to the contrary in any contract.

4. As a review of section 81.1(2) discloses, this section has no application to the case before us. For the purposes of reaching a decision in this case we will therefore only consider the other sections which the applicant has claimed the responding party has breached.

5. At the hearing the parties agreed that all particulars alleged in the application and response filed with the Board were to be accepted by the Board as facts, and the parties proceeded directly to make their arguments. For the purposes of this decision, the following are the facts upon which our decision is based.

6. The Home Care Unit of the Belleville General Hospital has been in existence for approximately twenty years. Prior to certification the staff of the Unit were subject to the policies, terms, and conditions of employment applicable to the non-union hospital staff. They received regular percentage increases in their wages and improvements in their benefit packages, along with other unorganized staff of the Hospital. Such enhancements in the compensation package were usually granted annually.

7. On July 14, 1992, the Board issued separate certificates for the full-time and part-time Home Care Case Managers of the Belleville General Hospital recognizing the Ontario Nurses Association, the applicant, as the exclusive bargaining agent for these employees (Board File No. 2268-91-R). To date the parties have not reached a first collective agreement, but are scheduled to appear before an interest arbitration board on August 16, 1994, to make submissions for their first collective agreement.

8. In August 1993 it became known to the applicant that the responding party had provided its non-bargaining unit staff with one extra week of vacation entitlement for the vacation year July 1, 1993, to June 30, 1994. The responding party indicated to the applicant that as a result of fiscal restraints it had given the non-bargaining unit staff the extra week of vacation entitlement because those staff members would not be receiving any wage increase for that year. Since the parties had not reached agreement on compensation increases for the 1993-1994 year at that time, the responding party indicated to the applicant it would offer the ONA bargaining unit members the same deal as the non-union staff: No percentage increase in wages in exchange for one extra week of vacation entitlement for that year. The applicant declined that offer as the parties were going to be putting their respective compensation positions before an interest arbitration board, but nonetheless ONA wanted the responding party to give the Home Care Case Managers the one week of

vacation entitlement in the interim. This application was filed after the responding party declined to grant the extra week of vacation entitlement.

9. The responding party takes the position that there has been no violation of the statutory freeze period as a result of its actions because it alleges it offered the applicant the same deal it had given the non-union staff, but the applicant does not want it. The Hospital alleges the applicant is “cherry picking” when it seeks to have the one extra week of vacation without taking the corresponding zero per cent increase in wages.

10. In *George St.L. McCall Chronic Care Wing of the Queensway General Hospital*, [1991] OLRB Rep. May 619, the Board described how section 13 of the HLDAA and section 81 (then section 79) of the *Labour Relations Act* operate:

12. ... section 13 of the HLDAA and 79 of the LRA operate together to prohibit an employer to which the HLDAA applies ... from altering working conditions (which include all terms and conditions of employment, including wages) in the circumstances set out therein. These are what are commonly known as “freeze” provisions. The purpose of these provisions is to provide a fixed and stable point of departure for collective bargaining, and to thereby facilitate the collective bargaining process, by maintaining the terms and conditions of employment for bargaining unit employees in the pattern which existed at the time the freeze provisions came into effect. This ensures a fixed basis for negotiations and precludes any unilateral alteration to the *status quo* which might give one party an unfair advantage in bargaining or for propaganda purposes.

13. Although the “freeze” label has stuck, it is a bit of a misnomer. Sections 13 and 79 of the HLDAA and the LRA respectively do not necessarily contemplate a static situation. As the Board’s jurisprudence demonstrates, it is the pattern that existed prior to the onset of the freeze and the reasonable expectations of employees which are preserved, not merely the terms and conditions of employment in effect at the point in time that the freeze provisions come into effect. As such, section 13 of the HLDAA and section 79 of the LRA are strict liability provisions in the sense that an employer’s actions need not be necessarily improperly motivated for it to be in breach of them (see *Beaver Electronics Ltd.* [1974] OLRB Rep. Mar. 120, *The Wellesley Hospital* [1976] OLRB Rep. July 364, *Kodak Canada Ltd.* [1977] OLRB Rep. Aug. 517).

14. The Board has interpreted the freeze provisions in a manner which recognizes an employer’s right to continue to manage its operations in accordance with a pattern which has been established prior to the freeze being triggered. This “business as before” approach was articulated and applied in *Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859. As subsequent cases demonstrate, it is not always easy to apply this test. Nor does applying it always lead to an obvious result. In that respect, for example, the Board has found that the freeze provisions do not prohibit first time events (see *Grey Owen Sound Joint Homes for the Aged* [1983] OLRB Rep. Apr. 522 where lay-offs occurred for the first time during the freeze; *Corporation of the Town of Petrolia* [1981] OLRB Rep. Mar. 261 where work was contracted out for the first time during the freeze). To clarify the business as before approach, and to accommodate first time events, the Board developed the “reasonable expectations” test....

11. The Hospital argued that the Board doctrine of “reasonable expectation of employees” applies in this case: That since the non-union employees got the extra week of vacation in return for receiving no increase in wages, so the reasonable expectation of the ONA bargaining unit members would be for the same package.

12. Citing the *Simpsons Limited*, [1985] OLRB Rep. April 594, decision and the cases cited therein, the responding party relied on the Board’s formulation of the “reasonable expectations of employees” doctrine wherein, on an objective standard, the Board considers the question of what a reasonable employee would expect to constitute his or her privileges and benefits in the specific circumstances of that employer. The “reasonable expectation” approach incorporates a review of the practice of the employer in the management of the operation with a review of the employees’

expectations. The freeze provisions are designed to address two categories of events: Those changes which can be measured against a pattern set in the history of the employer's operation, and, first-time events. In assessing each case the Board seeks to balance the employer's rights and the employee's rights following certification, and before the employer and the bargaining agent have reached a collective agreement. Thus, while the legislation seeks to protect the rights and privileges the employees enjoy at the time of certification, and until another regime is instituted, the Board also recognizes that the employer's business is not frozen in time by the statute.

13. The responding party argued that the granting of the extra week of vacation entitlement in lieu of an increase in wages constituted a first-time event driven by financial constraints and that the bargaining unit employees would therefore not have a reasonable expectation of getting that benefit without the corollary zero per cent increase in wages. However, the response filed by the Hospital indicates it had granted one extra week of vacation entitlement plus a one per cent increase in wages the year previous, for 1992-1993, so that it does not appear that the granting of one extra week of vacation entitlement tied to a limited wage increment is a first-time event.

14. The applicant argued that the situation was closer to one of the employer having an ongoing practice and therefore conformed to the "business as before" model. It suggested that since the Home Care Case Managers were always treated in the same manner as the rest of the non-union employees and had received the same benefits which those employees received, so in the normal course of business the Home Care Case Managers should have received the extra week of vacation entitlement. It was the applicant's position that the union did not have to agree to a zero per cent increase at this time as the parties will be making their respective submissions on this issue to the interest arbitration board.

15. The applicant referred us to the unreported decision in *The Sisters of St. Joseph of the Diocese of London, in Ontario*, November 22, 1989, Board File No. 0782-89-U, in which the Ontario Nurses Association alleged that the employer had acted contrary to section 13 of the HLDA and what is now section 81 of the *Labour Relations Act*. The employer had a practice of granting annual wage increases to its registered nurses to maintain parity with the rates of pay specified in the O.N.A. central collective agreement. After the registered nurses were organized by the Ontario Nurses Association, and before the parties had reached a collective agreement, the employer refused to grant the registered nurses annual increases in accordance with its usual practice although it did give non-bargaining unit employees a salary increase. At the hearing the employer argued, as the responding party did in this case, that since those parties had to engage in compulsory interest arbitration, the employer should not be required to grant the O.N.A. central agreement rates without any assurances that such rates would not be increased by the interest arbitration board. To do so, the employer argued, would be to give the union an unfair advantage. The Board found that based on custom and practice at that workplace the employees had a reasonable expectation that they would receive annual adjustments in their wages to maintain parity with the O.N.A. central agreement and that the privilege should be continued.

16. We are in agreement with the *Sisters of St. Joseph* decision, *supra*, and find it was a reasonable expectation of the Home Care Case Managers that they should receive the same package as did their non-union counterparts, as they had always received the same wage and benefit package in the past. This Board may only ensure that the freeze provisions of the legislation are complied with and that the affected employees receive the annual adjustments in wages, benefits, or privileges which they could reasonably expect based on the past practices of this employer.

17. For the above reasons, we find that the responding party has violated section 13 of the *Hospital Labour Disputes Arbitration Act* and section 81 of the *Labour Relations Act*. In order to

put the employees back in the position they would have been in but for the breaches of the Acts, we direct that the responding party grant to the employees of the full-time bargaining unit and the part-time bargaining unit the same compensation package which other non-bargaining unit employees were granted.

18. Having made the findings outlined above, it is not necessary to address the allegation of a violation of section 65 of the *Labour Relations Act*.

19. The Board remains seized of this matter in the event of any dispute between the parties in respect of the implementation of this decision.

CONCURRING OPINION OF BOARD MEMBER KAREN S. DAVIES; July 26, 1994

1. I am in complete concurrence with the majority decision in directing the responding party to grant to the employees of the full-time bargaining unit one week of vacation entitlement and to the part-time bargaining unit the same benefit of vacation entitlement which other non-bargaining unit part-time employees were granted.

2. This Board may only ensure that the freeze provisions of the legislation are complied with and that the affected employees have the benefit of any increases in wages, benefits or privileges which they could reasonably expect based on the past practices of the employer.

3. The issue of wage increases or improved benefits is a matter for the interest board of arbitration to determine. For the majority to have decided otherwise would be to exceed the Board's jurisdiction by attempting to restrict the authority of a properly constituted interest board of arbitration. Also a decision contrary to the majority decision would in fact fetter the collective bargaining rights of employees at minimum, if not render the collective bargaining process null and void.

3790-93-M; 3839-93-M; 3862-93-U United Food & Commercial Workers International Union, Locals 175 and 633, Applicant v. **The Great Atlantic and Pacific Company of Canada Limited**, The Partners of Miller Thomson, Barristers and Solicitors, Dirk Van De Kamer, Responding Parties; **The Great Atlantic & Pacific Company of Canada Limited**, Applicant v. United Food & Commercial Workers International Union, Locals 175 and 633 and Walter Marshall, Owen Hayes, Allan Mackie and Helen Hope, Responding Parties; **United Food & Commercial Workers International Union**, Locals 175 and 633, Applicant v. **The Great Atlantic and Pacific Company of Canada Limited**, The Partners of Miller Thomson, Barristers and Solicitors; Dirk Van De Kamer, Responding Parties

Picketing - Strike - Unfair Labour Practice - Employer seeking order to restrict alleged "unlawful picketing" and give it access to main receiving doors of struck store - Statute directing Board to focus not on lawfulness of picketing, but to balance newly conferred statutory picketing rights with applicant's operations to avoid undue disruption - Board adopting functional approach - Board declining to impose restrictions on picketing and dismissing employer's application under sec-

tion 11.1 of the Act - Board dismissing union's complaint that employer engaged in strike related misconduct contrary to section 73 of the Act

BEFORE: *Bram Herlich*, Vice-Chair.

APPEARANCES: *Cynthia D. Watson* and *Bob Geddes* for United Food & Commercial Workers International Union, Locals 175 and 633, and for the other responding parties in Board File 3839-93-M; *C. R. Robertson*, *T. K. Billings* and *J. R. Peardon* for The Great Atlantic & Pacific Company of Canada Limited and for the other responding parties in Board Files 3790-93-M and 3862-93-U.

DECISION OF THE BOARD; July 4, 1994

1. In Board file 3839-93-M the applicant (hereinafter referred to as the "employer" or the "company") seeks, under section 11.1(5) of the *Labour Relations Act*, the imposition of restrictions on the exercise of the statutory rights related to picketing as set out in section 11.1(3) of the Act. The responding parties in this application include the United Food & Commercial Workers International Union, Locals 175 and 633 (hereinafter the "union"), the bargaining agent for company employees engaged, at the time of the application, in a lawful strike.
2. Board file 3862-93-U is an application filed by the union pursuant to section 91 of the Act in which it is alleged that the employer and the other named responding parties have violated various sections of the Act, including sections 11.1(4), 71, and 73. Board file 3790-93-M is an application for an interim order pursuant to section 92.1 of the Act which the Union filed in relation to its application under section 91.
3. The company is engaged in selling food and grocery products to the public through various retail outlets including A & P, Dominion, and Miracle Food Mart ("MFM") stores. Each of these three groups of stores have separate collective bargaining regimes. On November 18, 1993 the union commenced a lawful strike in relation to the 63 stores previously subject to the terms of the MFM collective agreement which was in force until June 21, 1993. At the time these applications were filed and heard, that strike was continuing. All of these files relate chiefly to events which took place on February 4, 1993 outside what has been referred to as store 495, one of the 63 struck stores, an MFM store located in the Bramalea City Centre, a shopping centre open to the public.
4. In view of the common facts involved and a request by the company, these three matters were listed to be heard at the same time. Having regard to the expedited nature of the hearing into and disposition of its section 91 complaint, as well as the substantial overlap in relation to the relief being sought in its interim and main applications, the union sought and was granted leave to withdraw its application for an interim order at the commencement of these proceedings.
5. Hearing into the two remaining matters continued for four days. On the day following the conclusion of the hearing, various Ontario news outlets reported that a tentative settlement of the labour dispute had been reached; several days after that it was reported that the settlement had been ratified and concluded. In view of those reports, the Board, informally and through a Labour Relations Officer, contacted the parties. The settlement of the labour dispute was confirmed but all the parties indicated that they wished the Board to issue a decision disposing of these matters on their merits. In the circumstances, considering the resolution of the strike and the consequent redundancy, or at least inappropriateness, of any of the relief being sought (save perhaps, declara-

tory) it is open to the Board, in the exercise of its discretion (under both sections 11.1 and 91) and on its own motion to simply decline to deal with these matters any further.

6. I have considered and rejected that option for the following reasons. At the time the hearing was concluded there was no aspect of mootness associated with either application and the parties were clearly entitled to and in need of a resolution of these matters. None of the parties has sought to withdraw their applications or submitted that the Board ought not to proceed further in view of the strike settlement; on the contrary, the parties have indicated, at least informally, that they would benefit from a decision in these matters. Finally, these matters involve interpretation of, *inter alia*, the recently enacted provisions found in section 11.1 of the Act which creates new statutory rights which prevail over the common law. To date the Board has had little need or opportunity to turn its mind to these provisions. The Board is of the view that not only the parties directly involved but the labour relations community at large may well benefit from the opportunity to have the Board's analysis of these provisions in the context of the real facts litigated before it in these matters.

7. The Board heard the evidence of six witnesses. Twenty-eight exhibits were received, including a videotape and numerous photographs all taken outside store 495. In coming to its findings of fact the Board has carefully considered all of the evidence before it and taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers, and what seems most probable in all the circumstances. Having said that, I should observe that there is ultimately little significant dispute regarding at least the essential facts giving rise to these matters. There were, of course, substantial differences between the parties regarding general issues related to motivation and the propriety of the conduct of various players as well as the legal conclusions this Board should arrive at. Credibility, however, is not a major issue in this case and subject to some exceptions which will be dealt with as necessary, I am satisfied that all of the witnesses who testified gave their evidence with candour and a sincere desire to tell the truth. Of particular note was the testimony of John Hannan, the store 495 manager who testified for the company, and of Walter Marshall, a store 495 bargaining unit employee and picket captain, who testified on behalf of the union. These two witnesses both impressed me profoundly with their honesty, straightforwardness and integrity. If labour relations between the employer and the union could be entrusted chiefly to these two or to people of their calibre, no doubt many of the difficulties these parties have encountered might well have been avoided. Neither should the evidence of Detective Sergeant Bernard Rea and the role he played in these events escape comment at this stage. He gave his evidence in a candid and forthright manner exhibiting the same tact, discretion and sound judgement which characterized his conduct when he was called to "referee" the events the company put in motion on February 4, 1994. Detective Sergeant Rea conducted himself as a skilled professional and the labour relations community can only benefit from the continuing participation of this sort from various police forces.

8. Before outlining the events of February 4th, it will be instructive to briefly review some of the facts and accompanying litigation which form the backdrop and context for the instant matters. As already indicated, a legal strike involving 63 stores, including store 495, commenced on November 18, 1993. Within days of the commencement of the strike, the company filed an application under section 11.1 seeking to have the Board impose restrictions on picketing. The company had apparently encountered some difficulties at five of the sixty-three struck stores when it attempted to remove perishable product from the struck stores. In its application, which was dealt with by a different panel of the Board in Board File 2916-93-M, the company sought to restrain or restrict picketing at all of its struck stores across the province. In a decision dated November 25,

1993 the Chair of the Board issued a bottom line decision with abbreviated reasons in point form (see *The Great Atlantic & Pacific Company of Canada Limited*, [1993] OLRB Rep. Nov. 1230). The company's application was dismissed and, in a related application filed by the union, the Board found that the employer had violated the provisions of section 73.1 of the Act by using prohibited replacement workers. Full reasons for the Board's decision in that case were issued in a decision dated February 16, 1994 (the "McCormack decision") (see *The Great Atlantic & Pacific Company of Canada Limited*, [1994] OLRB Rep. Mar. 303) and were available to the instant parties prior to final argument in the present case.

9. In a separate proceeding, a motion brought by the company for an interlocutory injunction was heard by Winkler J. in the Ontario Court of Justice on December 3, 1993. This motion did not concern any of the struck stores but rather was brought to restrain picketing at one of the company's Dominion stores located in a shopping plaza. The principal issue dealt with in the Court's judgement, released December 20, 1993, was whether regulation of the picketing in question was to be dealt with by the Court or by the Board. For the purposes of that jurisdictional issue, the parties had agreed that the picketing in question amounted to a total obstruction of access to the store's receiving area and the respondents further conceded that total obstruction would constitute an "undue disruption". Notwithstanding that agreement and concession, Winkler J. accepted the respondents' argument that, in view of the jurisdiction conferred by the Legislature on the Board, an expert labour relations tribunal, it was for the Board and not the court to impose any sanction deemed appropriate. The employer's motion was dismissed.

10. The company's appeal of that ruling was heard before a panel of the Divisional Court on January 11, 1994. That appeal was dismissed in reasons for judgement which issued on January 24, 1994 (now reported, *Great Atlantic & Pacific Co. of Canada Ltd. v. Vance et al* (1994), 16 O.R. (3d) 816). While the court adopted the determination of Winkler J. that jurisdiction over the picketing in that case rested with the Board, the court's reasons included other commentary which the company's evidence and submissions make clear became part of the factual context and, indeed, perhaps even provided the impetus for the employer's conduct on February 4, 1994. In particular, the court observed that the "unlawful conduct of blocking ingress and egress to the premises" involved in that case was "unlawful picketing". And while the court affirmed that the conduct of both lawful and unlawful picketing falls within the jurisdiction of the Board under section 11.1(3), it explicitly drew its interpretation of the picketers' conduct as unlawful to the Board's attention, further warning that the Board's failure to apply the correct principles of law to the application of section 11.1 could result in jurisdictional error.

11. Of course the facts giving rise to the two court decisions just described were not before the Board in either the McCormack decision or the instant one. Indeed, so far as the Board is aware, the employer made no effort to bring or seek relief in relation to those facts before the Board. There is no doubt, however, that the strong views expressed by the Divisional Court influenced the company's subsequent conduct and, as employer counsel put it, that decision was the foundation of what took place on February 4, 1994.

12. With the commencement of the strike, the employer (no doubt influenced by the provisions of section 73.1) determined that it would suspend the operations of its struck stores, including 495, for the duration of the strike. Thus, store 495 had been closed to the public since November 18, 1993. Despite the closure, Mr. Hannan, the store manager continued to regularly attend at the store. Subject to a handful of exceptions which will be detailed more fully, no attempts were made to receive or ship out any goods at or from the store. On the night the strike commenced Mr. Marshall met with representatives of the mall in which store 495 is located to discuss matters relating to picketing during the strike. Mall management indicated it would designate 3 specific areas - an out-

side area in front of the main customer entrance to the store, an area inside one of the mall entrances and an area outside the store's main receiving doors. Picketers were asked to confine their activities within these areas designated by the mall. The boundaries of these areas were physically identified by means of paint or tape applied by the mall for that purpose. The picketers have complied with the limits set by mall management and there was no suggestion in any of the evidence before me that, until February 4, 1994, there were any difficulties which the parties have been unable to resolve arising out of or associated with the picketing.

13. There are three separate areas of the store capable, with varying degrees of efficiency and ease, of receiving deliveries of goods for the store. The main receiving doors have already been mentioned as an area outside of which the mall designated a picketing area. These receiving doors are the primary doors used when the store is in operation and are the ones which can best accommodate deliveries from large tractor trailer trucks. There is another set of receiving doors, which the parties referred to as the north-east doors, which are used primarily for deliveries of dairy products and frozen foods. Finally, there is a third set of doors located quite close to the main doors. This last set consists of two adjacent doors which abut onto a common loading dock. One of these doors (the one closest to the main doors) is, to the extent it is used at all, used by the employer. This door which we will refer to as the "old door" was, prior to renovations undertaken some seven years ago, the main receiving door for the store. The other door facing on this dock is used by the mall and its other tenants (and will be referred to as the mall door). The proximity of these doors to the main receiving doors is highlighted by the fact that the boundary of the picketing area designated by the mall includes a line extending from the mid-point of the common loading dock. In other words the picketing area outside the main doors (again, as designated by mall management) includes an area immediately in front of the old door but not the corresponding area immediately in front of the mall door.

14. Picketing activities commenced with the strike at all three of the designated locations. In the early stages of the strike a certain amount of debris began to accumulate in the area outside the main doors. Two buggy corrals, normally used to shelter shopping carts used by customers, were moved to locations in the designated picketing area outside the main doors. Over the course of the strike, this area became a makeshift regional strike headquarters for the union. Striking employees of various company stores in the region would check in and out to receive picketing assignments from strike organizers in the area outside the main doors. The area within one of these corrals was used for that purpose. The second corral was used to shelter wood which the picketers regularly burned within a fire barrel in order to generate some warmth during the particularly cold winter which accompanied the strike. By February 4th, and certainly earlier, it would not have been possible for any truck, let alone a large tractor trailer, to back into either the main doors or the old door without dismantling or otherwise removing the buggy corrals which over time had become more and more entrenched through the accumulation of further debris and the effect of a growing amount of ice and snow, the latter making the job of moving or dismantling the corrals all the more difficult.

15. While the area did function as co-ordinating and communication centre for the union, it should not be assumed that the number of picketers generally present was in any way overwhelming. The number of picketers was somewhat higher at the commencement of the strike, but by February 4th the union had ceased picketing the store entrance and generally had a handful of picketers at the other two designated locations including the main doors. Apart from those picketers, of course, other strikers would come and go spending a few minutes at the site during picket shift (usually four hours in duration) changes, perhaps briefly parking their cars on the site.

16. Mr. Hannan testified that early in the strike he met with mall management and inquired

whether the company might have access to the mall door during the course of the strike. Although the initial response was positive, Mr. Hannan was advised a few hours later that on the basis of legal advice and the desire not to become involved in the strike, mall management had decided not to allow the company to use the mall door. Not long after that, however, the company did have access to the mall door when certain perishable items were shipped from the store to food banks. A number of different trucks were involved in that exercise. The smaller ones (including a van) were able, notwithstanding the buggy corrals, to access the old door; a larger truck pulled up to the mall door to receive goods which were moved out the old door and along the common dock by hand to be loaded on the parked truck. This arrangement was arrived at through negotiations involving the company, the union (striking employees helped to load the trucks) and the mall. Apart from these few occasions on which product was shipped out of the store, it was not disputed that the company made no other efforts to receive or ship goods at or out of the store from the commencement of the strike until February 4, 1994.

17. Sometime shortly before February 4th, the company made a decision to attempt to remove certain perishable items from the store. The goods in question included six pallets of frozen beef (approximately 30 pieces of 50-54 kilograms each per pallet) and two pallets of cheese (containing a total of approximately 300 pieces of cheese). The eight skids containing these items had been prepared at the start of the strike and kept in the store. Although quite properly referred to as perishables, the vast majority of the items, the possible exception being some of the pieces of cheese, were not in any imminent danger of spoilage.

18. On February 4th, as a result of an anonymous telephone call received at the union office advising that the employer intended to remove inventory from store 495, Bob Geddes was dispatched to the store. Mr. Geddes is a company bargaining unit employee who normally works at a different store; he was also a member of the union negotiating committee and acted as an area co-ordinator during the strike. Upon his arrival at the picket site, Mr. Geddes conferred with the picketers, including Mr. Marshall. A consensus was quickly arrived at that the picketers would not object to the removal of product from the store provided the employer agreed to certain conditions including subjecting any delivery truck to a 5 - 5-1/2 hour delay and insuring that the items were "hand balmed", that is loaded piece by piece rather than by skids. Although we heard no direct evidence regarding events at any other stores, Mr. Geddes testified that these conditions were similar to those in effect at certain non-struck company stores. Mr. Marshall and Mr. Geddes then proceeded to seek out Mr. Hannan to make the arrangements. At this point, apart from the anonymous phone call, the union had no information and certainly none from the company directly regarding any plans to remove product from the store that day.

19. Mr. Geddes and Mr. Marshall met briefly with Mr. Hannan inside the mall at the store entrance. Mr. Geddes explained that the union had learned the company intended to remove product from the store that day and advised that the union would not prevent those efforts provided the company agreed to the conditions just described. Mr. Hannan told the two union representatives that he didn't know what they were talking about. The conversation ended when Mr. Hannan told them "you have to do what you have to do", a comment which Mr. Geddes claims, somewhat inexplicably, he took to signal agreement with the union's proposal. Mr. Hannan explained in his evidence that since he was not to be involved in any negotiations, he was consequently reluctant to divulge any information to the union. It was clear to him that it was Dirk Van de Kamer, a solicitor employed by the law firm representing the company (and a named responding party in the union's application), who was to act as the employer's chief representative in relation to the events of the day associated with the company's effort to remove product from the struck store. There is no doubt, as will become clear, that Mr. Van de Kamer indeed performed that function.

20. This brings us to a more general observation about the company's evidence. Relatively little direct evidence was called regarding who made what decisions leading up to and culminating in the events of February 4th. There was a corresponding similar paucity of evidence, at least from any of the principal decision makers, regarding why these decisions were taken. For example, while Mr. Hannan testified that he had been advised of the decision to remove goods from the store the previous day by Gerry Cox, the Vice-President of store operations for Miracle Food Mart, none of the witnesses who testified was directly involved in the decision to remove these goods. Similarly, while we heard evidence that Mr. Van de Kamer was seen from time to time during the day engaged in conversation on a cellular telephone, we heard nothing about the source or contents of any instructions he may have received either from his principals or his client as the events unfolded. In these circumstances, Mr. Van de Kamer's conduct must be seen as constituting the conduct of the company. Similarly, to the extent it may be necessary to draw inferences regarding the company's intentions, we have done so based on Mr. Van de Kamer's evidence as well as on an evaluation of the company's conduct.

21. At roughly the time Mr. Geddes and Mr. Marshall returned to the picket site outside the main doors, events began to unfold somewhat more rapidly. The precise order of events is not critical but a number of events transpired more or less simultaneously: Detective Sergeant Rea arrived on the scene; Mr. Hannan opened one of the main doors and Jean Doyle, an employee in the company's loss prevention department, began videotaping the proceedings; a large front end loader, tow trucks, and a further truck all converged on the scene as a result of arrangements made by the company. All of these events took place at approximately twelve noon, coinciding with the change in picket shifts - as picketers arrived on the scene to sign in or out for picket duty at various locations the unfolding events not surprisingly piqued their curiosity and prompted them to remain on the site. Mr. Marshall estimated that there may have been up to 30-35 striking employees on the scene, some of whom had also parked their cars on the site, far in excess of what had come to be the established number of picketers or cars on the site. Had the company deliberately planned and orchestrated events to maximize confusion, exacerbate confrontation and heighten the intimidation of picketers (all of which the union alleges), they could not have picked a better time.

22. It is clear, however, that the timing of these events to coincide with picket shift changes was purely fortuitous. The company had been awaiting Detective Sergeant Rea's arrival before initiating any attempt to remove product from the store. There was initially some confusion as to who had or had not called to solicit police assistance which resulted in Mr. Van de Kamer ultimately speaking to Detective Sergeant Rea over the phone at about 10:00 a.m. that morning. Mr. Van de Kamer advised Detective Sergeant Rea that the company wished to exercise its legal right to pull a truck up to the receiving doors and to remove product and that it expected police assistance in its efforts. Detective Sergeant Rea, somewhat reluctantly, agreed to attend at the store. His arrival, however, was delayed by some other obligations. Thus, there is no basis to conclude that the timing of the events to coincide with picket shift change was a deliberate company strategy.

23. What followed was a series of short and ultimately unsuccessful negotiations, brokered by Detective Sergeant Rea and aimed at facilitating the company's desire to remove product from its store. Mr. Geddes and Mr. Marshall represented the union in these discussions; Mr. Van de Kamer acted on behalf of the company. As indicated earlier, the union voiced no objection, in principle, to the company removing goods from its store. Its initial position in these discussions was identical to the position put to Mr. Hannan earlier. When it was clear that was unacceptable to the company, the union's position went through several modifications. Ultimately, the union proposed that the company back a truck up to the mall door and that the goods to be removed would be taken out the adjacent old door and moved along the common dock and loaded on to the truck. Any requirements for waiting time or delay were abandoned and the union offered to have picket-

ers assist in removing (the fairly limited) debris which may have accumulated on the common loading dock.

24. Mr. Van de Kamer's position throughout these negotiations was firm and unchanging. Anything less than an agreement to bring a truck up to the main doors, something which would have required the dismantling or removal of the buggy corrals being used by the picketers, was unacceptable. Indeed, he was essentially unprepared to discuss any alternative; he was most reluctant to enter into any discussions with the union representatives whom he described as "not properly present" and only grudgingly participated through Detective Sergeant Rea. At no time during these discussions did he consult with Mr. Hannan who would have been in a position to provide useful information about the feasibility of any of the alternatives proposed by the union.

25. Perhaps the most useful and interesting perspective on these events is provided by Detective Sergeant Rea who indicated in his evidence that he was somewhat surprised that the company undertook its initiative in view of the length of time that the store had been closed and the fact that there had been no previous difficulties at the picket site. Detective Sergeant Rea was clearly concerned that the company's decision and the manner in which it was attempting to implement it might itself result in a breach of the peace. For example, the arrival of the front end loader generated sufficient concern in his mind that he felt compelled to move his own car which he had parked in the vicinity. Shortly after that Mr. Van de Kamer advised him that tow trucks would be arriving to remove picketers' cars. Detective Sergeant Rea advised Mr. Van de Kamer that he would not permit any actions which would lead to a breach of the peace, but his attempt to persuade Mr. Van de Kamer to have the trucks (which by now had arrived) removed was unsuccessful. Ultimately, when the company rejected the union's last proposal and it was clear that Detective Sergeant Rea would not assist in any efforts to forcibly remove cars or the buggy corrals, the company called off its initiative and subsequently filed the instant application. Detective Sergeant Rea was somewhat charitable in his description of Mr. Van de Kamer's conduct: he declined to characterize him as belligerent but felt compelled to warn him that he could well face the prospect of arrest if he was responsible for creating a breach of the peace, a result he saw as a real possibility in view of Mr. Van de Kamer's conduct on behalf of the company.

26. The employer's argument in respect of its application to restrict picketing is simple and straightforward. The employer's conduct on February 4th was founded on the reasons of the Divisional Court decision already adverted to. It was after and as a result of that decision that the company decided to attempt to gain access to the main receiving doors. The employer has, since the commencement of the strike, been denied access to its main receiving doors. There has been a total blockage caused by the picketing and associated conduct including the accumulation of the buggy corrals and other debris in front of the main doors. The Divisional Court has already concluded that the blocking of ingress and egress to the premises involved in that case was unlawful conduct and, at the least, was unlawful picketing. The Board should arrive at a similar conclusion in the instant case.

27. The company also attempted to tie its argument more closely to the words of section 11.1(5) which provides:

11.1 -...

(5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.

28. Relying on various dictionary definitions of the word "undue", the employer argued

that illegal or unlawful conduct should be viewed as undue. Since the Divisional Court has already found similar conduct to be unlawful, the Board should conclude that the picketing in this case amounts to undue disruption and ought to be restricted.

29. The union's argument with respect to this aspect of the case is equally straightforward. It asserts that the proposal it made to facilitate the removal of the company's product was not only reasonable, but had the added virtue of being more efficient and expeditious than the company's approach, while at the same time minimizing any restriction on the exercise of the union's statutory rights set out in section 11.1.

30. It is useful at this point to set out the provisions of section 11.1 in their entirety:

11.1-(1) This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.

(2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. Attempts to persuade the employees may be made only at or near but outside the entrances and exits to the employees' workplace.

(3) During a lock-out or lawful strike, individuals have the right to be present on premises described in subsection (1) for the purpose of picketing, in connection with the lock-out or strike, the operations of an employer or a person acting on behalf of an employer. The picketing may occur only at or near but outside the entrances and exits to the operations.

(4) No person shall interfere with the exercise of a right described in subsection (2) or (3).

(5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.

(6) An application respecting the exercise or alleged exercise of a right described in subsection (2) or (3) may be made only to the Board and no action or proceeding otherwise lies at law.

(7) A party to an order made under subsection (5) may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(8) In the event of a conflict between a right described in subsection (2) or (3) and other rights established at common law or under the *Trespass to Property Act*, the right described in those subsections prevails.

31. The statute provides no definition of the term picketing. It is not surprising therefore that the Board, in the McCormack decision, reflected on the meaning of the word as follows at paragraph 32:

32. With this in mind, it is useful to turn to the matter of what constitutes picketing. This is not a particularly easy task. The modern picket line can involve a myriad of activities including: employees congregating, walking, standing or sitting in various formations; speeches, singing, and chanting; the use of sound equipment or other amplification; the carrying or presentation of signs, leaflets, armbands, T-shirts, hats, or jackets with various messages; effigies or other dramatic presentations; exhortations, discussions, and insults addressed to other employees, suppliers, members of management, allies and customers; the establishment and use of facilities for shelter, heat or hygienic purposes; various kinds of attempts to hamper, hinder, obstruct or delay the entry or egress of persons or goods; and the use of social pressure in a number of ways. This is not intended to be an exhaustive list by any means, nor to suggest that all such activities should be free from restriction. Rather, it simply gives some flavour of the broad range of activities which may make up labour relations picketing in the real world.

33. The purposes of picketing are likewise myriad. Generally they include social and economic pressure on an employer, allies, customers, suppliers or colleagues, soliciting support to honour the picket line or otherwise join cause with the strikers, showering opprobrium on those not in sympathy, mobilizing the strikers themselves and building morale and cohesiveness to withstand the strike, advertising and informing specific groups or the public generally of the dispute and other means of strengthening the bargaining power of strikers.

34. With such a diversity of both purpose and means, attempting to categorically define picketing is fraught with difficulties.

32. The union's conduct in the present case clearly falls within the broad parameters of conduct the Board identified as picketing. However, as the Board also observed, that fact alone is not sufficient to insulate such conduct from restriction by the Board pursuant to section 11.1(5). I would also add that there was no assertion by either party that the union's conduct did not generally fall within the definition of picketing or that there was any other basis to assert that the union's conduct was not primarily for the purpose of picketing in connection with a lawful strike as contemplated by the Act.

33. In the McCormack decision, the Board, at paragraph 19 and following also offered these general observations about the recently enacted section:

19. Section 11.1 was passed in an environment where there has been considerable growth in private space with a public character, represented by premises such as shopping malls. These provisions appear to address the resulting legal isolation of that property, which has the potential to discourage organizing or eliminate picketing as a meaningful economic sanction. Since this is the first decision issued by the Board under section 11.1, it is useful to examine this section in some detail.

20. The new provisions establish statutory rights to organize and picket, and describe the parameters of those rights. They then prohibit interference with the exercise of the new rights, although they provide for the imposition of restrictions by the Board as it considers appropriate to prevent the undue disruption of an applicant's operations. Finally, the Board is given exclusive jurisdiction over applications respecting those rights.

21. The context in which section 11.1 now operates includes an existing allocation of jurisdiction between the Courts and the Board with respect to picketing.

34. The Board then reviewed sections 101 and 102 of the *Courts of Justice Act* as well as section 78 of the *Labour Relations Act* and then continued:

24. In contrast, section 11.1 actually creates new substantive rights to picket and organize on certain premises (which, for the purposes of simplicity I will refer to as private property). It then protects those rights from interference and empowers the Board to impose restrictions in accordance with a specific test. Not only is this quite different from the way in which picketing has been treated at common law, even as filtered through the *Courts of Justice Act*, it may also be possible to conclude that the Act now provides a code supplanting the common law regime with respect to the premises in question. This is supported by both the comprehensive structure of section 11.1 and subsection (8) which provides that in the event of a conflict, the picketing and organizing rights prevail over the common law. In addition, it is evident that the Legislature chose not to address this issue in a manner which would have left the common law framework intact, for example, by simply amending the *Trespass to Property Act* as some provincial jurisdictions have done.

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26. The differences in these respective provisions highlight the fact that section 11.1 takes the Board into relatively new territory. In exploring that territory, the Board must be cautious not to import jurisprudence from the Courts in an unreflective manner. It goes almost without saying that the differences among both the various provisions set out above and the common law

may imply different results, depending on the situation. In addition, the Board has observed on a number of occasions that while judicial precedent may be useful in providing it with valuable insight, it is incumbent upon the Board to develop a sound and indigenous jurisprudence which reflects the complex realities of labour relations. If it did not ground its decisions in its more specific experience, the Board would be failing in its responsibility as an expert tribunal serving a distinct community. This is particularly true in an area like picketing, which is a labour relations activity with historical roots and a unique function and tradition in collective bargaining. Again, the Legislature could have addressed the problem of picketing on private property without transferring responsibility for overseeing it from the Courts to the Board. The fact that it chose to assign exclusive jurisdiction to the Board reinforces the Board's obligation to draw on its particular expertise.

35. There are at least two clear legislative policy choices which are evident from the enactment of section 11.1. The first, which we shall consider in greater detail below, involves a legislated modification to the common law approach to the interface between labour relations and private property rights in particular circumstances, an approach perhaps most typified in the well known case of *Harrison v. Carswell*, [1976] 2 S.C.R. 200. The second change involves entrusting the enforcement and general administration of the substantive legislative changes just referred to not to the courts but to this Board.

36. Judicial performance in labour relations areas and particularly with respect to issues related to picketing, has not escaped the attention of scholars and commentators. The broad parameters of what has been a lively and ongoing debate can be seen in the section of Adams, *Canadian Labour Law* (second edition) dealing with "Law of Picketing" (section 11.230 et seq.) which refers to various authorities and commentators. Relying on Tacon, *Tort Liability in a Collective Bargaining Regime*, Mr. Justice Adams offered the following general comment regarding picketing (at page 11-20):

... In this very sensitive area, the courts have been accused by various commentators of subverting legislative policy as enunciated in modern labour legislation and of usurping the jurisdiction of labour relations boards by employing legislation to enlarge their (the courts') own jurisdiction while ignoring the legislative preference for statutory remedies.

37. While the same commentators might express concern about the manner in which the decision of the Divisional Court appears to have become part of the facts in the instant case, they would no doubt be comforted by the consistent view of both Winkler J. and the Divisional Court that, as provided by section 11.1(6), jurisdiction over the exercise of section 11.1 rights lies exclusively with this Board.

38. Of course not only has the Legislature modified the traditional approach by entrusting jurisdiction over some aspects of picketing to this Board, it has also altered the substantive law, at least insofar as situations covered by section 11.1 are concerned. This Board has frequently commented (as it did in the McCormack decision just cited and in *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. Apr. 358 at paragraphs 13-15 dealing with applications for interim orders under section 92.1) that while the experience and jurisprudence of the courts may provide useful insights, great care ought to be exercised to avoid the mechanical transplantation of judicial approaches into the labour relations context. In the present case that care needs to be exercised all the more carefully since the legislation explicitly provides new legal rights and tests hitherto not considered by the courts.

39. It is perhaps this consideration which effects the undoing of the employer's argument in the present case. The company asks the Board to place restrictions on what it asserts is "unlawful picketing". The employer's argument, like its conduct on the day in question, rests on the dicta of the Divisional Court. Reduced to its essentials the company's argument suggests that if picketing

related conduct amounts to “unlawful picketing” i.e. picketing which the courts at common law and prior to the enactment of section 11.1 would have restrained, then so too should this Board place restrictions on such conduct. This argument effectively ignores the dual nature of the recent legislative amendments. It poses the wrong question.

40. Without suggesting that whether particular conduct can be characterized as unlawful will be of no interest, the Board’s jurisdiction is not plenary and, consequently, the primary inquiry in an application under section 11.1(5) must be rooted in the words of that section, the source of the Board’s jurisdiction. “Unlawful conduct” is an extremely broad category which can include criminal offences, breaches of municipal by-laws, conduct prohibited under the Act or under any other legislation, or conduct which may be the subject of a civil action at common law. For example, the employer conceded that if littering contrary to municipal regulation were associated with the picketing, that, in itself, would be unlikely to form the basis for Board ordered restrictions on picketing. At the other end of the spectrum, if there were serious acts of physical violence associated with the picketing, the result could well be different. We stress again, however, that the Board’s jurisdiction is statutory and certainly does not include enforcement of the criminal law. And, as Detective Sergeant Rea’s conduct and evidence in this matter demonstrate, the Board has little doubt that police forces across the province will not hesitate to intervene to prevent or halt serious breaches of the peace simply because section 11.1(6) provides no action or proceeding otherwise lies at law with respect to rights under section 11.1(2) or 11.1(3).

41. The Board’s inquiry is whether it ought to impose restrictions on the exercise of statutory picketing rights in order to prevent the undue disruption of the operations of the applicant. The Board must balance the newly conferred statutory picketing rights with the operations of the applicant to insure the latter is not unduly disrupted. The very wording of the legislation suggests that “mere disruption” as opposed to “undue disruption” will not result in the imposition of restrictions on picketing rights. Some level of disruption is contemplated by the statute. Further, it will not be sufficient that the disruption is, per se, “undue”, it must impact on the operations of the applicant. Thus, the Board must take a functional approach and it may be that the very same conduct in different contexts will yield different Board responses depending on the resulting disruption of operations in each case.

42. It was not seriously disputed that removal of the products in question was part of the operations of the applicant. And while the union (and, indeed, Detective Sergeant Rea) may have questioned the real need to remove that product at that particular stage in the strike, it should not generally be open to the union or this Board to second guess decisions clearly within the employer’s prerogative (unless, of course, some impugned motive is at work). To the extent, however, that the operations of the applicant consisted, for the purpose of this application, of efforts to remove product, I am not persuaded that any restrictions on the union’s picketing rights are appropriate in order to prevent the undue disruption of those operations. Having considered all the evidence, I am satisfied that the proposal of the union to effect the removal of the product in question would have generated no more (indeed, in all likelihood, less) disruption than the employer’s. While loading product at the main doors rather than via the old/mall door combination proposed by the union may have been marginally easier (assuming all other things to be equal), I am not persuaded that difference is significant enough to warrant restricting the union’s statutory rights. The viability of the union’s proposal is highlighted by the employer’s own evidence- Mr. Hannan testified that early in the strike he made efforts to secure access to the mall door. And while that request was ultimately turned down by a party understandably not wishing to become embroiled in the labour dispute, the evidence discloses that access to that door has been permitted on prior occasions where there has, effectively, been a joint employer-union request. The added virtue, of course, of the union’s proposal was that it requires no intrusion on the exercise of its picketing

rights. In all of the circumstances, I am satisfied that there was every prospect (had the company seriously entertained or considered the union's proposals) of the employer removing the goods in question without any undue disruption. Put somewhat differently, having considered the union's conduct in this matter, I am not persuaded that it is either appropriate or necessary to restrict its picketing activities in order to facilitate the removal of goods sought by the company. On that basis, I decline to impose any restrictions on the exercise of the union's picketing rights.

43. The company's evidence made it clear, however, that its object in its efforts on February 4th was not restricted to the removal of the goods in question. The employer also wanted to gain access to the main doors and make them accessible to trucks, including large tractor trailers. Apart from the removal of the goods in question, however, no functional basis for this objective was advanced in evidence or in argument. Indeed, the evidence disclosed that, but for a handful of exceptions, there have simply been no efforts to deliver or ship goods and, consequently, no functional need for access to the main doors so long as the company remained firm in its decision to not operate the store during the strike. We also must not lose sight of the fact that, in the circumstances of this case, the company's object of generally gaining access to the main doors necessarily (whether or not it is part of the company's motive) impacts on the conduct of the strike by the union. In that sense the company's application becomes (at least in part) an effort to gain at least a symbolic victory in an ongoing labour dispute. It effectively asks the Board to dismantle what has become regional strike headquarters for the union. In the absence of any functional need linked to the operations of the applicant, the Board will be reluctant to intervene to alter the balance in an ongoing labour dispute. In view of the provisions of the Act this reluctance may well prevail even in situations which, at common law, might have previously prompted a court to grant injunctive relief.

44. Alternatively, I note that the Board's authority to impose restrictions in such a case is discretionary. On that basis alone, given the conduct of the company through Mr. Van de Kamer, the Board would be loathe to intervene on the employer's behalf in this case. As already indicated the Board's approach to an application of this sort necessitates striking a delicate balance between preserving the exercise of statutorily conferred rights and insuring that the exercise of such rights does not unduly disrupt the operations of the applicant. Where an applicant demonstrates little or no effort to strike that balance or to reasonably consider or respond to proposals aimed at striking that balance before resorting to the Board, it may well find the Board reluctant to intervene. In the present case Mr. Van de Kamer maintained a firm and unwavering position. Not only was he unwilling to entertain or consider any alternatives to the company's position, he failed to even confer with Mr. Hannan to determine the practicability of the alternatives being suggested by the union. This is highlighted by his admission that he was not even aware of the "old door" (which was central to the union proposals) at the time the events in question were unfolding; he only became aware of its existence with the commencement of these hearings. He candidly testified that anything less than getting a truck to the main doors was unacceptable and that he would not have even hypothetically been interested in anything to do with the old door. He asserted that the Divisional Court had pronounced the company's lawful right to access which, in his view, meant the company had a right to remove anything impeding that access. He was simply uninterested in and, as his evidence about his knowledge of the old door demonstrates, was not even listening to any other proposed alternative regardless of whether such alternative would accomplish the company goal of removing its product with relatively less disruptive effect.

45. This brings me to a consideration of the union's application in this matter. Relying on cases like *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60 and *Securicor Investigation and Security Ltd.*, [1983] OLRB Rep. May 720, the union argues that not only has the

employer interfered with the exercise of rights under section 11.1(3), but has also engaged in strike related misconduct as defined in section 73(2) contrary to section 73(1).

46. While I have little hesitation in concluding that the company showed little in the way of sophisticated labour relations judgement, I am not persuaded that its conduct was in violation of the Act. If the shop floor is not a debating society, neither is the economic warfare of a labour relations dispute akin to the conduct of a tea party. The employer clearly has a right, whether or not ultimately successful, to come to this Board to seek the imposition of restrictions on the union's picketing activities. I am satisfied that its conduct on February 4th was in furtherance of that legitimate goal. Given the nature of the evidence called by the employer, I am unable to determine whether the exuberance Mr. Van de Kamer demonstrated on the day in question was his alone or merely reflects that of either his client or his principals. In this regard it was striking that Mr. Van de Kamer in his evidence was often unable to distinguish his own personal views from that of his client. It is, however, without question that the fashion in which matters were conducted on that day (again whether the result of Mr. Van de Kamer's own decisions or on the specific instructions of his client or principals) significantly subverted the prospect of any reasoned or rational resolution of the problem at hand. In this regard I am referring to the unleashing of something which resembled a clandestine military operation - orchestrating the more or less simultaneous arrival of the police, tow trucks, front end loader, video surveillance and other equipment, all without advance notice or discussion with the union followed by a virtual refusal to meaningfully discuss the issue with the union and an absolute refusal to even consider any reasonable proposals. And while I have already concluded that the manner in which the company acted was, in itself, sufficient to preclude the Board from exercising its discretion in the employer's favour, I am not persuaded that Mr. Van de Kamer or the company were not legally entitled to take those positions or that the conduct in question was contrary to the provisions of the Act.

47. In summary and for the reasons just outlined, the union's application for interim relief was withdrawn by leave of the Board at the commencement of the hearing. Both the employer's application under section 11.1 and the union's application under section 91 are hereby dismissed.

3703-93-M The Great Atlantic & Pacific Company of Canada, Limited, Applicant v. United Food & Commercial Workers International Union, Locals 175 and 633 and Shelly Fair Service, Scott Constable, Peggy Swift and Gary Dimock, Responding Parties

Picketing - Employer seeking order to restrict picketing at non-struck employer location - Picketers preventing direct access to loading docks and trucks directed to area of parking lot 225 feet away - Picketers permitting employer to unload across parking lot - Parking lot often icy and a number of employees sustaining injuries in unloading in bitter winter weather conditions - Following "staged" attempted delivery by employer alleged by union to be in breach of "deal", picketers imposing two hour interval between unloading of each truck - Board expressing view that some restriction on picketing appropriate to restrict distance over which unloading would be done to prevent unsafe situation created - Board not intervening to restrain two hour interval between unloading of trucks

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members W. H. Wightman and E. G. Theobald.

APPEARANCES: C. R. Robertson, T. K. Billings, Dick Van de Kamer, Fred Strang, Tom Richardson, David Byers and Judy Young for the applicant; Kelvin Kucey, Kathie Chrysler, Shelly Fairser-vice, Scott Constable, Peggy Swift and Gary Dimock for the responding parties.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER E. G. THEOBALD; July 28, 1994

1. This is an application pursuant to section 11.1(5) of the *Labour Relations Act* for restrictions on picketing. The applicant will be referred to as A & P or the company below. The responding parties will be referred to as UFCW or the union.

2. The union engaged in a lawful strike at Miracle Food Mart stores starting on November 18, 1993, in connection with which it picketed one of the employer's A & P stores in Oshawa. Although the strike and picketing ended shortly after the hearings in these matters, both parties indicated their desire for the decision to be rendered in any event. The parties are agreed that the facts of this case fall within the ambit of section 11.1. That section, which came into force on January 1, 1993, provides as follows:

11.1-(1) This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.

(2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. Attempts to persuade the employees may be made only at or near but outside the entrances and exits to the employees' workplace.

(3) During a lock-out or lawful strike, individuals have the right to be present on premises described in subsection (1) for the purpose of picketing, in connection with the lock-out or strike, the operations of an employer or a person acting on behalf of an employer. The picketing may occur only at or near but outside the entrances and exits to the operations.

(4) No person shall interfere with the exercise of a right described in subsection (2) or (3).

(5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.

(6) An application respecting the exercise or alleged exercise of a right described in subsection (2) or (3) may be made only to the Board and no action or proceeding otherwise lies at law.

(7) A party to an order made under subsection (5) may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(8) In the event of a conflict between a right described in subsection (2) or (3) and other rights established at common law or under the *Trespass to Property Act*, the right described in those subsections prevails.

3. We will provide an overview of the facts in roughly chronological order, and then return to section 11.1.

4. On November 18, 1993, UFCW started a legal strike at Miracle Food Mart Stores throughout Ontario. Picketing started on December 3, at Store 109 in Oshawa, a "non-struck" store which is situated in a mall surrounded by a parking lot. On the same day, the company brought a court application to enjoin picketing at store 808, also a non-struck store which was denied.

5. Between December 3 and 20 picketing prevented any product from being delivered to Store 109, as trucks were blocked at the entrance to the mall in which the store is found. The store ran out of major staples and produce.

6. On December 20, reasons for the denial of the company's December 3 application for an injunction referred to above issued. Winkler J. found the court had no jurisdiction to hear the company's application because of section 11.1 of the Act. On December 20, the parties also appeared before Mr. Justice Wright on an application to enjoin the obstruction of trucks from entering the mall property where Store 109 is situate. This resulted in a consent order allowing trucks onto the mall property.

7. The following day, December 21, 1993, as the parties sorted out the result of the consent order, the labour relations unit of the local police became involved. There were incidents of scuffling and punching after the police ordered the trucks onto the lot and they started to be hand unloaded across the parking lot. The police tried to mediate, and delivered the message from the picketers to the company that they would not allow the trucks to the loading docks, but would allow the company to unload across the parking lot. The police also made clear to the company that they would not remove the picketers from obstructing the path of the trucks as long as the line was peaceful. It was Christmas week, and the store needed stock; local management decided they were "prepared" to unload from the parking lot.

8. Between December 21, 1993 and January 25, 1994, up to 12 trucks were unloaded across approximately 225' of the parking lot on a daily basis. Product was brought through the store, over distances up to an additional 125'. The union calls this period the "old deal", meaning the arrangement brokered by the police on December 21, 1993.

9. On January 11, 1994, a three person panel of the Divisional Court heard an appeal of Mr. Justice Winkler's decision. Reasons of the Divisional Court were released on January 24 finding it had no jurisdiction. The court noted its view that the obstruction of trucks at Store 808 constituted unlawful picketing but that the jurisdiction of the Board included both lawful and unlawful picketing.

10. The following day, January 25, 1994, the company's lawyers went to Store 109 for what is referred to in their pleadings as a planned attempt to get a truck to the receiving dock. This was videotaped by A & P employees. A Wilson's truck, carrying only some soda pop, arrived at the entrance to the mall. Anticipating it would be unloaded as per the "old deal", picketers directed it to the usual spot in the parking lot. Instead, the truck was not unloaded, but left and returned, heading toward the loading dock. It turned its wheels toward the picket line in front of the dock, remained there for about 7 minutes and then was ordered to leave by company representatives. No attempt was made by management to unload it or to persuade the picketers to let the truck through to the receiving dock.

11. On January 26 the picketers, angry about the planned attempt of January 25, imposed a two hour interval between the unloading of each truck, still across the parking lot. It is the union's view that the "old deal" had been breached. The picket captains and local management met to discuss the matter. The picket captains took the position that unloading should be done either across the parking lot with a two hour delay, or it would attempt to revert to the situation prior to December 20, when there was no receiving at all. The store manager gave direction to the person on duty to do what was necessary to get the stock in. The company continued to unload in the parking lot, and the two hour delay remained. The union refers to this as the "new deal".

12. This application was filed on January 28, 1994.

13. What does section 11.1 mean when applied to the facts of this case?

14. It is clear from the wording of section 11.1 that the Legislature intended the Board to have a broad discretion in dealing with picketing on the type of premises described, typified by the shopping mall on which the store in question is situated. It is clear that part of the intent was to address facts such as those which related to the 1982 organizing campaign and subsequent labour dispute invoking the RWDSU and Eaton's. These included issues about the ability of the owner of the property, who was not the employer, to limit picketing on mall property. However, the wording of section 11.1 is not restricted to parties such as mall landlords who may be "non-disputants" in regards to the labour dispute. It includes the possibility of the struck employer being the applicant as is the case here.

15. The applicant employer made it clear at the outset that it was not arguing that the facts of this case were "secondary picketing". Secondary picketing is that somewhat fluid term of art which attempts to distinguish parties, and sometimes sites, which are not appropriately affected by the normal incidents of strikes and lock-outs, such as picketing, because they involve other than the primary parties to the labour dispute. We are dealing in this case with the primary parties to the labour dispute, albeit at a location of the employer which is not a struck store. It is common ground that the applicant owns both the struck Miracle Food Mart stores and the non-struck A & P store here in question. Thus we are not called upon here to decide the effect of section 11.1 (5) where picketing is found to be secondary.

16. Given the various dates of acquisition of stores under the banners of Dominion and Miracle Food Mart, and the bargaining units and collective agreements in place in those stores, A & P employs at the "non-struck" stores employees in the same type of jobs, and in the case of A & P stores, employees represented by the same union, who are not on strike and who are operating those stores.

17. The parties are agreed that the picketers here in question have a right to be present in the parking lot of the A & P store for the purpose of picketing in connection with the strike, at or near the entrances and exits to the operating store. Thus, there is no dispute as to the location of the picketing.

18. Where the parties join issue is on the question of how the picketers are picketing, and whether the effects of the picketing, acknowledged as intended by the union, are such that the picketing should be restrained. It was not disputed that the Board has been given the power to restrain the picketing as to how it is done, with a view to the effects on the applicant, in this case the employer.

19. The parties' basic disagreement is about whether the employer's operations have been unduly disrupted. Whether or not the operations have been disrupted, the union argues the facts are not ones in which the Board should consider it appropriate to intervene, given the history of the parties in relation to the ongoing picketing at the store.

20. The employer urges us to replicate the common law approach to the restriction of picketing, and says there should be no difference between the approach the Board takes to these matters and that of the courts. Specifically, the employer made reference to the court's indications on January 24 that what the employer argues is similar picketing is unlawful because it results in obstruction of employer premises. Therefore, it follows, it is submitted, that the picketing should be enjoined. The employer's central argument is that the word "undue", as applied to these facts, means unlawful, and that we should follow what it argues is the practice of the Courts and restrict the picketing in a manner which ensures its uninterrupted access to its receiving dock.

21. The union argues that to adopt the approach suggested by the employer would be to ignore the legislative intention in removing this aspect of picketing from the jurisdiction of the courts, as expressed in section 11.1(6) and further reinforced in section 11.1(8). It acknowledges that the pre-strike receiving practices of the employer have been disrupted to some extent. However, it says that as a practical matter, the operations of the store, being the sale of food to the public, have not been disrupted in any significant way. The store in question is fully stocked; customers, employees and managers are not being impeded in entry and exit to the store, and the company did not plead any effect on its operations writ large, either at the store level or as an overall matter. The union acknowledges that the effect of the picketing is to make receiving more expensive and inconvenient, but argues that this is well within the expected realm of events during the situation of economic sanctions, which are specifically provided for as part of the collective bargaining scheme. Referring to *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 it submits that the Supreme Court of Canada has specifically acknowledged that the infliction of economic harm is the very purpose of a strike or lockout. The union argues that there is no evidence to warrant a finding that there is anything disproportionate about the disruption of the struck employer's store.

22. More specifically, the union argues that in the circumstances of this case, it would be inappropriate for the Board to intervene, as the parties have worked out arrangements with the police and the company which have kept the picketing peaceful and the flow of goods into the store uninterrupted since December 21, 1993.

23. The employer strenuously resists any suggestion that the situation existing in the weeks prior to this application had anything to do with consent, and urges us to find that any response by the local store management to requests from the police or the picket line were in the nature of coerced acceptance of inevitability. Moreover, submits company counsel, whatever one might make of the circumstances prior to January 28, the date this application was filed, it was clear that "all deals were off" as of that date.

24. In approaching the parties' arguments, the Board must assess how well they accord with the intention of the Legislature in passing these new provisions of the Act. It is our duty to attempt to implement that intention, and it would be a matter going to our jurisdiction if we applied any test other than the one set out in section 11.1. The Board's first decision under section 11.1 which discussed this point, and related to the same strike, is reported as *The Great Atlantic & Pacific Company of Canada Limited*, [1994] OLRB Rep. Mar. 303. In looking at the wording of section 11.1, perhaps the most obvious thing about it is how it differs from other available models. At the time of the passage of the section, the Legislature can be presumed to have been aware of the body of common law relating to picketing, as well as to the then applicable statutory provisions both in Ontario and in other Canadian jurisdictions. It can also have been taken to be aware that the statutory provisions in place at the time were themselves the product of a trend in legislative enactments relating to picketing, dealing with aspects of the common law which did not adequately accord with the intention of various provincial legislatures. A few examples will serve to illustrate.

25. In British Columbia, after criticism of the role of the common law in labour disputes, the B.C. Labour Relations Board, and its successors, were given jurisdiction over picketing as a labour relations matter, and a detailed code to administer, amended from time to time to deal with problem trends as they arose. See for a brief history and discussion of B.C.'s approach as of 1975, *Canex Placer Limited*, (1975) 1 Can. L.R.B.R. 269 (B.C.L.R.B.). The labour legislation, including the picketing provisions, has been amended since in B.C., but not in a way inconsistent with this point. In Manitoba, after *Harrison v. Carswell*, (1976) 62 D.L.R. (3d) 68 S.C.C., in which the Supreme Court of Canada decided that its *Petty Trespass Act* proscribed picketing in malls unless allowed by the proprietor, the *Petty Trespass Act* was amended to allow picketing. When the

Ontario legislature passed the current *Courts of Justice Act*, and its predecessor *Judicature Act*, it put strict preconditions on the granting of injunctions in labour disputes, and made it clear that they were to be used sparingly, and after other avenues, such as police assistance, had been tried and failed.

26. When it came to section 11.1, though, the Legislature did not write a code as detailed as in British Columbia. Rather it created a new statutory right to picket, and made it unlawful to interfere with that right. It gave the Board the broad discretion to qualify that right to prevent undue disruption, where appropriate. Nor did it just amend the law of trespass as in Manitoba. Instead, it made the newly created right dominant, in the case of conflict, over both the common law and the *Trespass to Property Act*. Nor did it give the Board wording in any way similar to the *Courts of Justice Act* to administer, or codify the law of nuisance or mischief. Rather it gave the Board a highly flexible tool. It is appropriate to infer from the fact that the jurisdiction to regulate the new right to picket was given to the Board, that the Legislature intended it would take its place as part of the established scheme of law and policy which the Board already administers. Part of the reason administrative tribunals exist in the area of labour law is the specific mandate to inject policy and the balancing of competing labour relations interests into its interpretation of the law.

27. In trying to interpret what legislative purpose, or policy aspect was intended to be injected into the exercise of the Board's discretion, both parties made reference to the purpose clause of the *Labour Relations Act*, amended at the same time as the creation of section 11.1 to read as follows:

2.1 The following are the purposes of this Act.

1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.

2. To encourage the process of collective bargaining so as to enhance,

- (i) the ability of employees to negotiate terms and conditions of employment with their employer.
- (ii) the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
- (iii) increased employee participation in the workplace.

28. The employer emphasized the wording in paragraph 1 of that section which refers to the rights of workers to participate in the lawful activities of the trade union. It asks us to infer that we are meant to take action to restrain picketing where the actions of the trade union are unlawful, as it argues is the case here.

29. The union argues that the portion to which the employer refers is directed at organizing, and not to the late stage of collective bargaining of strikes and lockouts. The union asked us to find that the focus of the purpose clause on encouraging the settlement of differences between the employer and the union should indicate that we should leave the matter to the parties whenever possible to work out and that the Board should not interfere on facts such as these.

30. Further, the union argues that there is no evidence of any unlawful conduct, or conduct warranting injunction even at common law. In support of the latter submission, the union cites

examples of cases in which the Courts have declined to enjoin conduct which might have been considered unlawful on the employer's theory of the case. These were *Nedco Ltd. v. Nichols et al.*, [1973] O.R. 944, *Nadrofsky Steel Erecting Ltd. v. Doyle et al.*, [1973] O.R. 515, *Blackstone Industrial Products Ltd. v. Parsons et al.*, [1979] 23 O.R. (2d), and the oral decision in *Canada Post v. C.U.P.W.*, [1991] 84 D.L.R. (4th) where Montgomery J. said that if any incidents of unrest on the picket line there in question were as a result of the behaviour of Canada Post, no injunction would issue. Union counsel asks us to find that the events on which the company relies, specifically the events of January 25, 1994 and the two hour delay in unloading which occurred thereafter, were a direct result of the company's provocation in resiling from the arrangement earlier brokered by the police.

31. Prior to the passage of section 11.1, the Board's only involvement in regulating picketing, was in regulating its effect if it could be said to be causing illegal strikes under what is now section 78 which provides as follows:

78.- (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

Looking at picketing cases dealing with allegations of unlawful strikes in Ontario and with regulation of picketing in other jurisdictions serves to highlight the unusual facts of our case. No one has been deterred from working by the picket line. There is no evidence that customers were asked not to enter the store. The picket line is focused on the receiving functions, which the union admits have been disrupted somewhat. No one other than the drivers of the delivery trucks is being asked to engage in what the Board in *Sarnia Construction Association*, [1982] OLRB Rep. June 922 called "choosing between their loyalty to the labour movement and their legal obligations". And we have no information as to whether the drivers of the trucks other than the one on January 25 were willing to deliver or not. That driver was responding to orders from A & P as to what to do and when to leave rather than "respecting" the picket line.

32. But whether one sees the facts as novel in the context of strike and picketing jurisprudence or not, the parties agree section 11.1 applies to them. Because the interpretation of its wording is in its infancy, it is neither necessary nor desirable to try to exhaustively define its terms. However, it is necessary to deal with the approaches suggested by the parties.

33. The employer's position is that we should make a finding that the picketing is unlawful picketing and restrain it as undue disruption. This position appears to invite a focus on picketing methods rather than the impact of those methods. As part of the court's finding that its jurisdiction had been ousted, the reasons of January 24, 1994 point out that the legislature did not distinguish between unlawful and lawful picketing in section 11.1. Thus, we are of the view that the statute does not provide a basis for an adjudication on "lawfulness" as the main focus of interpretation of the section. Where the legislature wished to use the concept of unlawful activity as a constituent element of a section of the Act, it has done so, as in section 47(3), but it has not done so here.

34. The employer's suggested approach also raises the question as to whether section 11.1 asks that the Board focus on the adjudication of what is unlawful in areas traditionally not included in our jurisdiction, such as various torts or crimes. We note that the regulation of picketing by the courts has not primarily involved such an adjudication either, as the injunctions are fashioned as interim measures, and a party need only show a *prima facie* or arguable case. In practice the main

action may never proceed, and the adjudication on the merits of what conduct is unlawful may not occur.

35. It is interesting in this respect to note that at one time the B.C. legislation provided a right to picket “without acts that are otherwise unlawful”. The B.C. Board in *Canex Placer Limited*, cited above, considered the effect of the removal of that wording, which had incorporated by reference the general body of law which might make conduct on a picket line illegal. The B.C. Board found that the result was that it no longer had jurisdiction to deal with or restrain activity for unlawfulness, that the Legislature clearly did not intend it to enforce this entire body of the general law. It decided therefore, that it had the jurisdiction to regulate the “why, where and when” of picketing, but not the “how”, which was for the courts under the general law.

36. The wording of section 11.1 avoids the conundrum facing the B.C. Board in *Canex*. It employs a different concept, which focuses more on the expected result of the behaviour than a characterization of the behaviour. The concept of prevention of undue disruption of the operations in our view is centred on impact. The Board’s task is to evaluate what the nature and extent of disruption of the operations is likely to be if the behaviour is allowed to continue unrestricted, not how lawful or unlawful the conduct to date may be. To give an example, if a picketer has done something unlawful, like smoking in a public building in Toronto, at the same time as picketing, but is in no way disrupting the operations of the applicant, it is not our view that the threshold for the exercise of our discretion would be met. But on the other hand if the picketer is doing something perfectly lawful which will completely disrupt the applicant’s operations, the threshold would very likely be met. In neither case would it appear that the legislature intended the Board to frame the adjudication in terms of classifying the behaviour as lawful or unlawful. It is the prospective impact, the prevention of undue disruption, we are directed to focus on. We find this focus reinforced by the presence of section 11.1(8) which provides that the new picketing rights would prevail over any relevant common law right in any event.

37. We are of the view that the focus on the nature and extent of the disruption is both more consistent with the historical roots of the section referred to above, and with the expertise that a labour relations tribunal can bring to bear. This focus is also consistent with the flexibility that the section gives in many respects, including distinguishing between combatants and non-combatants in the labour dispute. It may well be that what is undue disruption of the operations of another mall tenant who is unconnected with the labour dispute may not be such for one of the primary players in the labour dispute.

38. We turn then to focus on the nature and extent of disruption of the applicant employer’s operations likely to pertain if the picketing activity described above were to continue unrestricted. The aspect of the employer’s operations which have been disrupted is the receiving function at Store 109. The employer has not had direct access to its receiving dock since early December, with certain minor exceptions such as when the picketers were away voting on a contract offer one day. It illustrates this by way of the planned attempt to deliver on January 25. After that date, unloading across the parking lot has been delayed two hours between trucks. The core of its case is that it is thus suffering a disruption in the normal incidents of its property rights. The actual supply side of the operation has not been disrupted to any significant extent. The store is apparently fully stocked, with a few exceptions due to trucks leaving because of the wait. The store manager’s evidence was that he was able to minimize the impact on the store operation by telling the trucks to come earlier. And it is also clear that the delivery of January 25 was completely unnecessary to the store’s operation. It was in fact never delivered; the load of soda pop was reordered later in the week. The evidence disclosed nothing about the impact of the picketing activity on the operations of the employer beyond the store level. We find it highly likely that this type of disruption would

continue if not restrained since similar disruption had gone on for some time before the hearing took place before the Board, and the union witnesses did not indicate any intention to change their focus.

39. There are a number of effects of the disruption. One of them is financial. It costs more in wages to unload across the parking lot because it is slower and takes more staff than when the delivery trucks unload at the receiving dock as they have always done prior to the strike. The evidence was that it took about ten times more staff to get a truck unloaded than before the strike. There was no evidence about the precise impact on trucking costs, but they were increased because of the extra time involved from the drivers.

40. The evidence establishes that the unloading routine which resulted from the picketing was also disruptive from a safety point of view. Unloading occurred at all hours of the day and night in bitter winter weather conditions. Picketers sometimes surrounded those unloading. The parking lot was often icy, and a number of injuries have been sustained by employees. For the most part, they appear to have been ones which would not have been likely to occur unloading onto a dry receiving dock off a trailer at level with the dock.

41. Would the continuation of the above state of affairs constitute undue disruption which the Board should consider preventing? The concept of “undue” is necessarily imprecise and resistant to exhaustive definition. It contains at least the meanings of improper and disproportionate, which in abbreviated form represent the parties’ arguments in this area. The company argued that what the picketers were doing was improper and unlawful and for that reason alone should be something the Board should find it appropriate to restrain. The union argued for a kind of assessment of proportionality to the overall operations, and in the absence of evidence of those overall operations submitted the application must fail.

42. In this regard, it is worth noting that the section contemplates some disruption as a result of picketing. It is only the prevention of *undue* disruption which is given as the threshold for the discretion to intervene. Where the boundary between “due” and “undue” disruption lies will have to be determined on a case by case basis. However, given the section’s place in the overall scheme of the Act, it is appropriate that the threshold between due and undue disruption be measured against labour relations goals. These include the protection of the rights set out in the Act, including the picketing right in section 11.1(3). As the Board said at paragraph 40 of the *A & P* decision cited above:

40. However, the word “undue” makes it clear that mere disruption alone will not give rise to restrictions. Rather, it must be something which qualifies as undue disruption. Among other things, “undue” suggests a measurement of degree in relationship to some purpose or need, that is, in contrast to disruption which might be “due”. Having regard to the structure of section 11.1, that purpose or need appears to be the rights set out in subsections (2) and (3). In other words, the Board’s examination of undue disruption in this case must include an assessment of the degree of disruption with reference to the right to picket.

Respect for the place of economic sanctions in the collective bargaining process is part of the scheme of the Act and is an appropriate labour relations consideration as well. Harmony is probably not an attainable goal in the midst of such sanctions. But if the Board can play a role in preventing escalation and bitter conflict, that too is an appropriate goal. Prudent exercise of the Board’s power should be marked by caution because of the inevitable potential for distorting the economic contest of the strike or lock-out.

43. The legislature has not defined the new picketing right with any precision. At a minimum, it would be taken to include those elements recognized by the pre-existing common-law in

cases such as *Williams et. al. Aristocratic Restaurants*, (1951) 3 D.L.R. 769 S.C.C., and *Dolphin Delivery Ltd.*, cited above, i.e. to be present for the purpose of peacefully communicating information concerning the dispute, which will potentially involve some interference with the persons communicated to and will often have as its object the infliction of economic harm on the opposing party. The Board will assess the disruption and what it is appropriate to do about it in respect of this right. The Board will balance the interests of the parties in determining whether it will intervene. These include in this case the picketers' entitlement to have the section 11.1(3) right protected and the employer's interest in the use of its property and running of its business. The section recognizes that neither interest is absolute. Union counsel argued that the decision of the Supreme Court of Canada in *Dolphin Delivery*, cited above, recognizes one of the goals of economic sanctions to be the infliction of economic damage on the other side in the dispute. This is true. However, to say that it is one of the goals of a strike does not mean that the picketing right in section 11.1(3) protects every aspect of economic damage inflicted on the other side.

44. The events pleaded by the applicant as warranting intervention are two: 1) The planned attempt to deliver a few flats of soda pop on January 25 and 2) the subsequent two-hour delay which was added to the unloading across the parking lot. Although evidence concerning the period before January 25 was heard in relation to the union's defence, we are not asked to rule on that period in terms of whether restrictions should have been imposed.

45. We are of the view that the evidence about the attempt of January 25 does not disclose facts which would cause us to find undue disruption on any standard, including either of the party's. The evidence is that approximately 20 peaceful picketers were able to persuade a truck to go into one corner of the parking lot. The truck left and returned and waited for approximately seven minutes with its wheels turned in the direction of the receiving dock before being ordered to leave by company representatives. There is no evidence that anyone asked the picketers to move, although we accept that it is unlikely they would have done so in the period of time it had its wheels turned towards the dock.

46. The events that followed are considerably more problematic. In reaction to the events of January 25, which the picketers found provocative, trucks were again diverted to a location 225' from the nearest entry to the store and a two-hour wait was imposed between the end of unloading one truck and the start of the next. Picketing went on both in front of the dock and behind the trucks, preventing the doors from opening. The parties then met and came to what can best be described as a truce. In return for an undertaking that the delay between trucks would not get worse than two hours, local management said it would unload across the parking lot rather than risk receiving no stock at all.

47. Union counsel's argument revolved around the idea that the company had agreed to the arrangement and that the operations could not be said to be disrupted if the store was fully stocked. We accept that the disruption of the operations here at issue is not anywhere near the point of shutting down even the store operations, much less those of the employer writ large. But we are not of the view that the concept of disruption is purely quantitative, although it necessarily has a quantitative aspect. Nor are we persuaded that the type of arrangement arrived at in this case between the picket captains and local store management precludes any restriction which the Board would otherwise find appropriate particularly where there was no caselaw to guide the parties given how new section 11.1 is. However, it is an important factor for consideration in the exercise of our discretion. In many cases the parties' de facto arrangements may be sufficient reason to decline to intervene. And any party's intransigence in attempting to come to a peaceable detente may be sufficient reason as well.

48. When measured against the right to picket set out in section 11.1(3), we are of the view that at least one aspect of the arrangement after January 25 warrants some restriction. The 225 feet distance across the parking lot over which unloading was being done has created a situation which we do not find safe. The company's lack of ability to provide safe working conditions while unloading significant volumes of material across the often icy parking lot is illustrated by the injuries sustained by employees, which included fractures and a concussion. We are of the view that this is undue disruption which should be prevented, as the statutory right of the picketers to be present in the parking lot for the purpose of picketing does not, in our view, require the continuing unsafe situation. There is an important employer, employee and public interest in the safety of the working conditions provided to those unloading the trucks. We did not find that interest to be outweighed by any aspect of the picketing right of which we were made aware. The safety aspect leads us to find that the operative element of section 11.1(5), the threshold of there being likely undue disruption which the Board must consider whether to restrict, exists in this case.

49. We turn then to whether we consider it appropriate to impose restrictions. Elements of the facts which are relevant to the exercise of that discretion include, from the union's point of view, the "agreement" with store management on the post-January 25 unloading procedures and the fact that the store is fully stocked and operating from a sales point of view. From management's point of view, the "agreement" was only for the purpose of preventing a total disruption of supply and was no longer in effect at the time of the hearing. Their view is that there is no factor which should stand in the way of the Board's use of its discretion in this case.

50. We are of the view that some restriction on the picketing would have been appropriate to restrict at least the distance over which the unloading would be done to prevent the unsafe situation created.

51. We are very aware that the employer had absorbed the disruption caused by the distance for a number of weeks. We are also of the view that the process of brokering arrangements with the assistance of the police, which lead to the original arrangement in December is something to be encouraged. It is evident that the Durham Regional Police have thoughtfully and responsibly considered their role in keeping the peace while remaining appropriately neutral in the civil dispute that a strike represents. And in the facts of our case the brokered arrangement kept the peace for over five weeks. However, it is clear that there was no agreement that the arrangement would be indefinite or that the company's ongoing attempts to litigate the issue would cease. There have been moves and counter moves in the picketing tactics of both sides on the facts before us. The Board will always be reluctant to intervene where it appears the main effect will be to further the tactics of one side or the other, and thus will be necessarily cautious in interfering with arrangements that have been arrived at by the parties with or without the assistance of the police. However, the unsafe conditions produced, in our view, counter balance the weight of the arrangement as a measure of something the parties produced in light of the pressures of the economic sanction of the strike.

52. The other aspect of the facts which the company argued we ought to restrain was the addition of the two hour interval between the unloading of trucks. On a quantitative basis, the evidence is not convincing that this delay has had other than a financially disruptive effect as store management has reduced its impact to minimal by rescheduling trucks. The company chose not to quantify this factor, and in the result, we are unable to find that it was unduly disruptive in terms of the extent of its impact on the operations.

53. Looking at the nature, rather than the extent, of the two hour interval, it was imposed in response to what the picketers saw as a provocative move on the company's part. It was clear to

the picketers, and admitted by the company, that the January 25 delivery was for the purpose of building a case, and was not part of the normal delivery operation. The "staged" manner in which it was done, with video cameras, and the surveillance connotation that carries to many people, had a predictable effect on the picketers. It escalated tension and produced a counter tactic. Although the delay was arbitrary, the company's acceptance of it as a part of the new truce was an indication that it could absorb the attendant disruption without a great deal of difficulty. We are not of the view that it is appropriate for the Board to exercise its discretion to intervene where as here the problem is a direct result of a conscious strategy which had a highly foreseeable escalating effect.

54. Weighing the competing interests of the parties, we find that intervention to prevent undue disruption as outlined above is appropriate. Before finally determining the matter, we would have found it appropriate to give the parties an opportunity to attempt to agree on what those restrictions might be, as they have some history of being able to make arrangements here and at other picket sites. Given that the strike is over, and the parties did not have this opportunity to attempt to agree, we do not think it appropriate to determine what precise form those restrictions would have taken.

OPINION OF BOARD MEMBER W. H. WIGHTMAN; July 28, 1994

1. The Divisional Court found that what the union referred to as the "old deal", and what the majority refer to as having been "brokered" by the police on December 21, had evolved out of unlawful picketing. Notwithstanding its acknowledgement that the Board has jurisdiction, I do not believe this makes the view of the court less compelling, if that is what I take paragraph 36 of the majority to be saying.

2. If an individual is entitled to be free of the nuisance of someone else's illegal behaviour, that is to be able to live without having to put up with the illegality whatsoever, then the illegality itself makes the disruption "undue". To attempt to argue otherwise is to attempt to turn the "illegality" into a "legality". I cannot think this was the intent of the legislature.

3. It is not necessary to speculate as to the intent of the Government. Both the intent and expectations were made clear by the Minister of Labour, as reported in Hansard, Tuesday August 4, 1992, when he summed up the essence of Bill 40. The Minister said in part:

... "the third major goal of these amendments is to reduce the level of industrial conflict in the province by removing the flashpoints and obstacles that only serve to frustrate effective labour-management relations. We intend to introduce a number of measures to promote the smooth operation of the collective bargaining process".

4. While section 11.1(5) is capable of being interpreted to mean the legislators anticipated some disruption of operations will occur and must be tolerated, and notwithstanding section 11.1(8), I would not have thought it open to the Board to conclude that section 11.1(5) also prevails over the purposes section 2.1 which on its face protects only lawful activities.

5. For the Board to find as "not undue" those activities which the court found to be unlawful would be to endorse what I might describe as the "Don Cherry Theory of Refereeing". It hardly seems consistent with the "spirit of cooperation", partnership and trust" anticipated in the August 4 statement. Nor, in my view, will such a finding tend "to promote the smooth operation of the collective bargaining process".

6. In those Canadian systems of labour relations which permit strikes their justification rests on the premise that, when all else fails, the strike serves as a means of testing the relative

positions (offer v. demands) of the parties. In this context picketing is an acceptable activity but only to the extent it is limited to conveying information to others in an effort to garner support for the union position.

7. Paragraphs 7 and 40 of the majority decision allude to activities I would have thought should not be countenanced in light of the August 4 statement referred to earlier.

8. I feel it should be noted that in these situations, as in so many other aspects of their work, the police are placed in an invidious position. Like my colleagues I can but admire their professionalism in handling this matter. It takes nothing from their role to also find that the store management, far from entering into a "deal" or agreement, was determined to exercise the right to attempt to resist the disruption of this "non-struck" store without being the cause of an escalation of hostilities. To this end they acquiesced to the arrangement under duress.

9. In the result, I would have acceded to the applicant's motion including a restraint on the two hour delays in unloading trucks.

4509-93-M The Practical Nurses Federation of Ontario, Applicant v. The Mississauga Hospital, Responding Party

Change in Working Conditions - Discharge - Discharge for Union Activity - Hospital Labour Disputes Arbitration Act- Interim Relief - Remedies - Settlement - Unfair Labour Practice - Union certified three years earlier and still without first collective agreement - Union making unfair labour practice complaint in respect of work reorganization ("alternative placement") and lay-offs affecting one-half of the bargaining unit - Union alleging that employer's conduct motivated by anti-union *animus*, breaching statutory freeze and violating minutes of settlement of earlier complaint - Union seeking interim order preserving *status quo* pending disposition of unfair labour practice complaint or until interest arbitration award issued - Employer implementing impugned changes after notice of union's interim relief application, but before Board hearing - Board concluding that balance of harm weighing in favour making interim order - Employer directed to restore and maintain *status quo* with respect to bargaining unit jobs pending disposition of union's complaint

BEFORE: *Judith McCormack*, Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

DECISION OF THE BOARD; July 29, 1994

1. This is an application for interim relief under section 92.1 of the *Labour Relations Act*. On April 6th, 1994, the Board issued the following oral decision:

After carefully considering the parties' submissions, we direct that the employer restore the *status quo* which existed as of March 30, 1994 with respect to the jobs of RPN's, and maintain that *status quo* until the main application has been disposed of by the Board. To minimize the impact of this order on the employer, the main application will be scheduled for hearing on an expedited basis starting April 14, 1994 and continuing day after day, Monday to Thursday, until it is completed. The issue of deferral is remitted to the panel hearing the main application. Our reasons will follow.

We now provide our reasons.

2. The interim relief application before us relates to a complaint under section 91 of the *Labour Relations Act*. To understand both that complaint and this application, some background information is necessary. Most of the facts in this matter are not in dispute.

3. The applicant union originally applied for certification for a group of approximately 165 registered practical nurses in February of 1991. The Board issued a preliminary decision on the appropriateness of the bargaining unit on December 5, 1991. The hospital then applied for reconsideration of that decision, which was rejected by the Board on February 8, 1992. On June 15th of that year, the union was certified as the exclusive bargaining agent for the employees in question.

4. The parties commenced negotiations for a collective agreement and met on a number of occasions in 1992. A no-board report was issued on February 22, 1993. In the same month, the Board rejected the Hospital's second request for reconsideration of the certification decision.

5. The union also filed its first complaint under section 91 of the *Labour Relations Act*. The parties entered into minutes of settlement on April 29, 1993 with respect to that complaint. Those minutes provided in part as follows:

The Hospital represents that there are no present plans for permanent bed closures or amalgamation of units. If such plans are proposed, the Hospital agrees to meet with the union and the employees for the purposes of discussing the proposed plans.

6. A second complaint was filed by the union in December of 1993 in regard to the transfer of nine nurses in the neurosurgery unit, which the parties adjourned *sine die*.

7. In the meantime, the parties were proceeding to interest arbitration under *The Hospital Labour Disputes Arbitration Act*. The hearing was held on February 18, 1994. Two days before the hearing, the hospital advised employees that it was projecting a 4.3 million dollar deficit for its fiscal year April 1, 1994 to March 31, 1994. Six options to deal with the projected deficit were presented, with a seventh added on the day of the hearing of the interest arbitration. All options involved the elimination of full-time hours of work. Among the issues in dispute at the interest arbitration was a union proposal which would require six months notice (or pay in lieu thereof) in the event of a permanent or long-term layoff.

8. Employees were invited by the hospital to attend staff open forums on February 24th and 25th. On March 2nd, the hospital posted a budget brief to staff indicating that the previous evening, the Board of Directors had approved in principle the closure of sixty-two beds. On March 17th, the hospital met with the union and advised them that of approximately 133 remaining RPNs, fifty would be required to apply for alternate placements, and twenty-five would likely be laid off. The union's local president requested the names of RPNs affected, and copies of the letters to them. The Hospital refused to provide this information but supplied the union with blank copies of the letters. The reason given for not providing the names of RPNs affected was that it was "personal". At the interim order hearing, the hospital agreed to provide these names in response to a question from the Board.

9. With one exception, all the layoffs in the nursing division of the hospital were imposed on the newly-certified RPN unit rather than other groups of employees such as the non-unionized nurses. Approximately one-half of the members of the RPN unit were affected by the letters. Ultimately, only 16 RPNs were given final layoff notices, due to internal adjustments.

10. The union then wrote to the hospital asking that the hospital's actions be revoked or postponed until the award of the interest arbitration board had issued, a course of action which the hospital declined.

11. The union subsequently brought this application, which the hospital acknowledges was delivered to it on March 30, 1994. Because of the intervention of a holiday weekend, a hearing was scheduled for April 5, 1994. On April 4th, the hospital implemented the changes.

12. The union takes the position that the hospital's conduct was motivated by anti-union animus and an attempt to decimate the bargaining unit; that the hospital's actions are a reaction to the union's request for job security provisions in the collective agreement and an attempt to circumvent the impact of the arbitrator's award by laying off RPNs before the award issues; that the hospital breached the terms of the minutes of settlement above because it did not discuss the bed closures until after the decision had already been made by the Board of Directors and was in the process of implementation; and that the hospital breached the freeze provisions of the *Labour Relations Act*.

13. By way of interim relief, the union requests that the Board direct the hospital to revoke or postpone the implementation of the alternative placement and layoff notices until the section 91 complaint related to accompanying this application is determined or until the interest arbitration award is issued. It also asks for compensation for any affected employee. Counsel asserts that without such an order, the bargaining unit will be decimated, support for the union will be further undermined, and it will be difficult to restore the status quo subsequently. He argues that in light of the volume of difficult litigation between the parties, and because over three years have elapsed since the union applied for certification and there is still no collective agreement, the union's position is a fragile one, particularly since the open period is likely to follow the issuance of the interest award in short succession.

14. The hospital disputes the union's assertions with respect to violating the *Labour Relations Act*, and argues that the harm to the union is purely economic, which can be the subject of compensation in the section 91 complaint if necessary. In contrast, counsel asserts that the harm to the hospital consists of letting its deficit accumulate unnecessarily. Counsel is also of the view that the underlying issue in the related section 91 complaint is job security, and that that issue is presently before the interest arbitration board. As a result, the Board should defer hearing the section 91 complaint to that board. In addition, counsel notes that the union did not make an application for an interim order with respect to the December 1993 unfair labour practice complaint involving the transfer of 9 RPN's from the neurosurgery unit. Counsel argues that this indicates that the section 91 complaint related to this case which also involves transfers is less urgent than the union asserts.

15. Section 92.1 provides as follows:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

16. The language of section 92.1(1) makes it clear that the Board has a large measure of discretion in determining applications for interim relief. In applying this section, the Board has considered both whether the applicant has an arguable case on the main application, and whether the possible harm which might flow from granting the application outweighs that which may occur if the requested relief is denied. With this basic framework in mind, the Board has also considered such factors as delay, whether the harm is purely economic, the preferred labour relations circumstances to be preserved or created on an interim basis, the preservation of a meaningful remedy on the main application, the effect on the process of collective bargaining or the collective bargaining relationship, the scheme of the Act, and broader public or labour relations policy considerations. The Board's assessment takes place in the context of its specialized expertise in labour relations

and the administration of the statutes it applies. (See, *Loeb Highland*, [1993] OLRB Rep. Mar. 197; *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358; *Price Club Canada Inc.*, [1993] OLRB Rep. July 637; *Blue Line Taxi Company Limited*, [1993] OLRB Rep. Aug. 793; *La Section catholique du Conseil scolaire de langue française d'Ottawa-Carleton*, [1993] OLRB Rep. Sept. 844; *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. Mar. 242; *The Hydro-Electric Commission of the City of Ottawa*, [1993] OLRB Rep. Nov. 1231; *Metropolitan Toronto Apartment Builders Association*, [1993] OLRB Rep. Mar. 219; *The Bay-Kingston, et al.*, [1993] OLRB Rep. Dec. 1350; *Fort Erie Duty Free Shoppe Inc.*, [1993] OLRB Rep. Dec. 1307; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019 and *William Neilson Ltd.*, [1994] OLRB Rep. Mar. 326.

17. Turning to the arguments in this case, we find that the union has an arguable case in the sense that if its allegations with respect to anti-union animus are proven, they would amount to violations of the *Labour Relations Act*. This leads us to a consideration of the balance of harm.

18. In this regard, we approach the matter as if the changes implemented by the hospital had not yet taken effect. In other words, the issue before us is whether to postpone the changes pending the outcome of the main application, not whether to revoke them. We do so because the hospital had notice of both the main complaint and the April 5th interim order hearing at the time it effected the changes on April 4th. If we were to allow a party with such notice to rely on the difficulty of undoing changes implemented with the full knowledge of the kind of order sought here, we would open up the possibility of the integrity of our processes being affected by self-serving activities. This is particularly so in circumstances where it is not clear that there was any reason why the changes could not have waited for one day until the interim order hearing.

19. With this in mind, we turn to the harm the union asserts is likely to flow if the interim relief is not granted. The combined operation of the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* means that the open period in which employees can apply to terminate the union's bargaining rights is likely to arise shortly after the issuance of the interest arbitration award. The effect is that after three years of waiting and uncertainty, employees will likely have the benefit of a collective agreement for only a brief moment in time before the stability usually provided by the closed period disappears. The normal sequence of events where parties have an opportunity to experience life under a collective bargaining regime for a significant length of time before the issue of representation can be raised again has been distorted by this process. Instead of a period of adjustment during which the parties would usually be building a labour relationship, there has been only the kind of delay and uncertainty which the Board has noted previously may erode the interest of employees in collective bargaining. This makes the case before us quite different from those addressed by the Board in *William Neilson Ltd.*, *supra*, and *Fort Erie Duty Free Shoppe*, *supra*, which among other things, involved established labour relationships. In these circumstances, we accept that the union's position is more precarious than it might otherwise be.

20. The harm cited by the hospital consists of allowing the deficit to continue to accumulate until the main proceedings are completed. While there is no doubt that the deficit is a considerable amount of money, it appears from the hospital's material that it has been accumulating since at least July of 1993, some eight months. The layoffs, which presumably have the greatest impact on the deficit, are also staggered over a span of time in the hospital's plan, so that a number may not be affected at all by the interim order if the main application is heard expeditiously. With this in mind, it appears that the situation is not so pressing that a short postponement would make a significant difference. To ensure that such a postponement is indeed short, however, and to minimize any possible harm to the hospital, we are moving up the hearing date of the main application and scheduling it on an expedited basis.

21. On balance, we conclude that the harm which may flow from granting the interim order requested is less than that which may result from not granting it.

22. We are not inclined, however, to tie the duration of the interim order to the issuance of the interest arbitration award as the union requested. In the first place, we have no way of knowing when the award will issue, with the effect that an interim order intended to continue for several weeks at the most may subsist for several months. We do not think it would be fair to keep the hospital in limbo indefinitely.

23. Secondly, interim relief is related to proceedings under the *Labour Relations Act*. Section 92.1 provides that it is available "on application in a pending or intended proceeding", which we interpret as a proceeding under the *Labour Relations Act*, rather than the *Hospital Disputes Labour Arbitration Act*. While there is some overlap between these two statutes, the nature of that overlap does not suggest to us that the Board has the jurisdiction to make orders for interim relief under section 92.1 in proceedings under the *Hospital Labour Disputes Arbitration Act* alone. As a result, we have some doubt as to whether an interim order can survive the final disposition of the main application in the absence of any other *Labour Relations Act* proceedings. Given the expedited scheduling of the main application, it may well be determined prior to the issuance of the interest arbitration award, with the effect that it may compromise the jurisdiction of an extended interim order.

24. Finally, it is not unlikely that both the positions of the hospital and the union in this case reflect a backdrop of strategic considerations with respect to the interest arbitration award. In the circumstances of this case, we are not prepared to allow the Board to get caught up in those considerations by orienting our decision towards those other proceedings.

25. Turning lastly to the hospital's argument with respect to deferring the main application to the interest arbitration, we are of the view that it would be more appropriate to have this matter dealt with by the panel hearing that application. In essence, it is an issue which relates to the merits of that application rather than interim relief. As a result, we are remitting this issue to that panel.

0322-94-R Ontario Liquor Boards Employees' Union, Applicant v. **The Municipality of Metropolitan Toronto**, Metropolitan Toronto Civic Employees' Union, Local 43, and Canadian Union of Public Employees, Local 79, Responding Parties

Certification - Trade Union - Liquor Boards Employee's Union applying for certification in respect of certain municipal employees - Union's constitution restricting membership to employees of the Crown, its agencies or any private employer - Board concluding that municipal employees not eligible for membership under applicant union's constitution - Union not having established practice of admitting persons to membership without regard to constitution's eligibility requirements - Application dismissed

BEFORE: Robert D. Howe, Vice-Chair, and Board Members G. O. Shamanski and P. V. Grasso.

APPEARANCES: Craig Flood and Don McDermott for the applicant; Colleen Edwards and Harold Ball for The Municipality of Metropolitan Toronto; Harold F. Caley and Anne Dubas for Cana-

dian Union of Public Employees, Local 79; no one appeared on behalf of Metropolitan Toronto Civic Employees' Union, Local 43.

DECISION OF THE BOARD; July 5, 1994

1. In a decision dated June 15, 1994 [now reported at [1994] OLRB Rep. June 795] regarding this application for certification, the Board wrote as follows:

For reasons which will be provided at a later date, this application for certification is hereby dismissed.

The purpose of this decision is to provide the Board's reasons for dismissing the application.

2. The applicant (also referred to in this decision as the "Union" and the "O.L.B.E.U.", for ease of exposition) seeks by means of this application to be certified as bargaining agent for the following bargaining unit:

all employees of the respondent employed exclusively in the hostels in the Municipality of Metropolitan Toronto who are regularly employed for not more than 34 hours per week, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff and persons for whom any trade union held bargaining rights as of the date of application.

3. The applicant has been found by the Board in a previous proceeding under the *Labour Relations Act* (the "Act") to be a trade union within the meaning of subsection 1(1) of the Act. Since no evidence to the contrary was adduced in the instant case, that finding is proof in these proceedings that the applicant is a trade union for the purposes of the Act, by virtue of section 107 of the Act. However, it is the position of Canadian Union of Public Employees, Local 79, which has intervened in these proceedings (and which will be referred to in this decision as "Local 79" for ease of reference), that the application should be dismissed on the grounds that the applicant is not eligible to represent the employees for whom it seeks bargaining rights by means of this application because those employees cannot become members of the applicant under the provisions of the applicant's Constitution. The Municipality of Metropolitan Toronto (also referred to in this decision as "Metro") takes no position regarding that issue. Metropolitan Toronto Civic Employees' Union, Local 43 ("Local 43") also intervened in these proceedings. Local 43's position regarding this issue, as recorded in the report of the parties' meeting with a Board Officer on June 10, 1994, is that it is "not a bar to the applicant". However, that position was not pursued at the hearing of this matter, as no one appeared on behalf of Local 43 at the hearing. (It is also the position of Local 79 that the application should be dismissed on the grounds that it already represents those employees. However, it is unnecessary for the Board to determine the validity of that contention in the circumstances of this case.)

4. The basis of Local 79's position that the applicant is ineligible to represent the employees in question is the first sentence of the following part of Article IV of the applicant's Constitution:

ARTICLE IV - MEMBERSHIP

4.1 Membership shall be open to all employees of the Crown, any of its agencies, or of any private employer. Any person applying for membership shall be required to file a written application and shall, in addition, be required to pay the requisite initiation fees fixed by the Union.

• • • • •

5. Counsel for Local 79 submitted that membership in the applicant is not open to the

employees of Metro whom the applicant seeks to represent as they are not “employees of the Crown, any of its agencies, or of any private employer.” Counsel for the applicant acknowledged that Metro is neither the Crown nor a Crown agency, but submitted that it is a “private employer” within the meaning of Article 4.1. In this regard he contended that in the context of the applicant’s Constitution, “private employer” means any employer covered by the *Labour Relations Act*. In support of that position, he also referred the Board to the following provisions of the Constitution:

ARTICLE III - DEFINITIONS AND INTERPRETATION

• • •

Employer - shall mean the Liquor Control Board of Ontario, the Liquor Licence Board of Ontario, or any other private or public sector undertaking which employs members of the Union.

Employee - shall mean an employee of the Liquor Control Board of Ontario, the Liquor Licence Board of Ontario, or any other private or public sector undertaking which employs members of the Union.

• • • •

6. The legal nature of the responding party is described as follows in subsection 2(1) the *Municipality of Metropolitan Toronto Act*, R.S.O. 1990, c. M.62:

The inhabitants of the Metropolitan Area are continued a body corporate under the name of The Municipality of Metropolitan Toronto....

That legislation (which also refers to the responding party as the “Metropolitan Corporation”) defines “Metropolitan Area” to mean “the area from time to time included within the Borough of East York, the City of Etobicoke, the City of North York, the City of Scarborough, the City of Toronto and the City of York”. It provides for the powers of the Municipality of Metropolitan Toronto to be exercised by the Metropolitan Council through the passage of by-laws, and also expressly empowers the Metropolitan Council to “pass by-laws for appointing such officers and employees as it may consider necessary for the purposes of the Metropolitan Corporation, or for carrying into effect any Act of the Legislature or by-law of the Metropolitan Council” (see subsection 23(1)).

7. As is evident from the provisions of that legislation as well as from its name, the responding party is a municipality (somewhat analogous to a regional municipality). As such, it is clearly a public sector employer (see, for example, *The Corporation of the City of Thunder Bay*, [1984] OLRB Rep. May 759, at paragraph 23, in which the Board described the Corporation of the City of Thunder Bay as a “substantial public sector employer”), and would certainly not normally be referred to as a “private” employer. As indicated by the dictionary definitions of the word “private” to which we were referred by counsel for Local 79, that term generally denotes something which affects, belongs to, or is used by private individuals, as distinct from the general public. Thus, the usual plain meaning of that term does not support the applicant’s contention that employees of Metro are eligible for membership in the O.L.B.E.U. Moreover, there is nothing in the Union’s Constitution which warrants adopting the artificially expanded interpretation of that phrase advocated by counsel for the applicant. In the context of the Constitution read as a whole, we are satisfied that the inclusion of the phrase “public sector undertaking”, in the clause “or any other private or public sector undertaking which employs members of the Union” in the Article III definitions of “Employer” and “Employee”, merely reflects the fact that the Constitution has been amended so as to make membership available not just to employees of the Liquor Control Board of Ontario and employees of the Liquor Licence Board of Ontario (the “Liquor Boards”), but to

all employees of the Crown or any of its agencies, as well as to the employees of any private employer. However, the inclusion of that phrase in those definitions does not expand the scope of Article IV. Indeed, the use of that potentially broad terminology serves to highlight the fact that Article IV is cast in more restricted terms, and the fact that if the amenders of the Constitution had intended to extend membership eligibility to all public sector and private sector employees, or to all employees covered by the *Labour Relations Act*, they could easily have employed language which would clearly so provide. Nevertheless, in view of the possibility that the phrase "private employer" might contain a latent ambiguity which could be both disclosed and clarified by means of extrinsic evidence, the Board overruled an objection by counsel for Local 79 to the introduction of such evidence and permitted it to be adduced by the applicant.

8. The extrinsic evidence adduced by the Union took the form of excerpts from verbatim minutes of the Union's February 1986 Policy and Objectives Conference, and its September 1986 Fall Reporting Conference; a copy of the constitutional amendments from the Union's September 1986 and February 1987 Conferences; and a "Report on Organizing" prepared for the Union's February 1987 Conference by Heino Nielsen, who has been a business agent of the applicant since 1983 and held various other positions within the Union prior to that. Those documents were identified and explained by Mr. Nielsen, who was the sole witness called to testify in these proceedings.

9. The applicant was initially a voluntary social organization for employees of the Liquor Boards. Over the years it has evolved into a more formal organization whose objectives include improving the wages, hours of work, and working conditions of its members, increasing their job security, and conducting negotiations with representatives of the Liquor Boards to accomplish those objectives. Prior to the amendments which resulted in the constitutional provisions quoted earlier in this decision, membership in the Union was restricted to employees of the Liquor Boards. During the 1980's, reductions in the work forces of those Boards, and concerns about potential erosion of the employees' job security through contracting out of work to private employers, prompted the Union to embark upon a lengthy review and revitalization process, which included using a highly experienced labour lawyer to assist it in preparing those constitutional amendments.

10. It is unnecessary for purposes of this decision to detail the evidence adduced before the Board in respect of those constitutional amendments. It suffices to note that, although some fragments of that evidence might be viewed as providing an element of support for the applicant's position if considered in isolation, when viewed as a whole the evidence clearly indicates that the constitutional amendments in question were not intended to enable the applicant to organize municipal employees, but rather to enable it to enjoy future growth and protect its members' job security by allowing the Union to organize the employees of private employers, such as privately owned and operated duty free border crossing stores created by the Federal Government, and the Pearson International Airport duty free operations which the Union understood the Province to be seriously considering contracting out.

11. Thus, although the applicant's Constitution, as amended, enables it to accept as members not only persons employed by the Liquor Boards, but also any other employees of the Crown or any of its agencies, and employees of any private employer, it does not enable it to accept as members municipal employees, such as those employed by the Municipality of Metropolitan Toronto to whom this application pertains.

12. The approach which the Board has traditionally adopted in cases of this type was described as follows in *Wilfrid Laurier University*, [1988] OLRB Rep. Aug. 851:

11. The Board has traditionally refused to certify a trade union as bargaining agent where

that union's constitution renders ineligible for membership at least some of the persons whom the union will be required to represent if certified: *G.K.L. Industries Ltd.*, [1985] OLRB Rep. Oct. 1464.

In the *G.K.L. Industries* case, the Board wrote as follows regarding the rationale for that approach:

9. The Board has consistently refused to certify [a trade union] when its constitution renders ineligible for membership some or all of the employees it would be required to represent if certified.... The rationale for that approach is that if the trade union negotiated a collective agreement which made membership in it a condition of employment (as permitted in certain circumstances by section 46 [now section 47] of the Act), such constitutional membership restrictions could result in the discharge of employees whom the trade union is required to represent.

13. It is common ground between the applicant and Local 79 that the approach described in those cases remains applicable despite the "Bill 40" amendments to the Act. Prior to those amendments, the Act defined "member" (when used with reference to a trade union) to include "a person who, (i) has applied for membership in the trade union, and (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union". That definition was removed from the Act by the "Bill 40" amendments, and replaced (in part) by references in various parts of the Act, such as subsection 8(1), to "employees who are members of the trade union on [the certification application date] or who have applied to become members on or before that date". In this regard, counsel for the applicant did not dispute the assertion by counsel for Local 79 that it is an implicit requirement of those provisions that the "employees ... who have applied to become members" will be eligible for membership in the trade union which is seeking to obtain bargaining rights in respect of them through certification.

14. The applicant's case is also not advanced by subsection 105(4) of the Act, which provides:

Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

Other than employees of the Liquor Control Board of Ontario and employees of the Liquor Licence Board of Ontario, the only persons who have been admitted into membership in the applicant are employees of privately owned duty free operations, such as the Fort Erie Duty Free Shop Limited, Thousand Islands Duty Free Store Limited, the Bluewater Duty Free Store, and DFS International at Pearson International Airport's Terminal 3. (Although a Union steward who obtained employment as a dispatcher had some discussions with various dispatchers, including dispatchers employed by the municipal police force of Gananoque, his efforts to interest them in the Union did not advance beyond the discussion stage.)

15. Thus, for the foregoing reasons, the Board unanimously concluded that the application should be dismissed, as the employees for whom the applicant seeks to obtain bargaining rights through certification are not eligible for membership in the applicant under the provisions of its Constitution, and the applicant does not have an established practice of admitting persons to membership without regard to the eligibility requirements of its Constitution.

0571-94-R; 0572-94-R Association of GO Transit Enforcement Officers. Applicant v. **Toronto Area Transit Operating Authority**, Responding Party v. Amalgamated Transit Union, Local 1587, Intervenor; Association of GO Transit Enforcement Officers, Applicant v. Amalgamated Transit Union, Local 1587, Responding Party v. **Toronto Area Transit Operating Authority**, Intervenor

Certification - Crown Employees Collective Bargaining Act - Termination - Rival union seeking to terminate incumbent union's bargaining rights for certain "enforcement officers" employed by Crown agency covered by Crown Employees Collective Bargaining Act, 1993 (Bill 117) and/or applying to be certified to represent those employees - Parties disputing effect of transition provisions in Bill 117 - Board concluding that Labour Relations Board (and not Ontario Public Service Labour Relations Tribunal) having jurisdiction to determine the applications and that provisions of "old" Crown Employees Collective Bargaining Act applying to the applications

BEFORE: M. A. Nairn, Vice-Chair, and Board Members W. A. Correll and H. Peacock.

APPEARANCES: Sean Clancy, John Hoyt and Jeff Coffey for the applicant; Irene Wolfe, James R. Hassell and G. Lodge for Toronto Area Transit Operating Authority; Elizabeth Mitchell, Simon Clarke, Paula Chapman and Serge Civiero for Amalgamated Transit Union, Local 1587.

DECISION OF THE BOARD; July 12, 1994

1. The name of the responding party in the title of proceedings in Board File No. 0571-94-R is amended to read: "Toronto Area Transit Operating Authority".
2. Board File No. 0571-94-R is an application for certification on behalf of a group of enforcement officers employed by the Toronto Area Transit Operating Authority ("GO Transit" or the "employer"). Board File No. 0572-94-R is an application to terminate bargaining rights, brought on behalf of the same group of employees. Both were filed with the Board on May 18, 1994. The fact of the two applications brought on the same date reflect certain circumstances unusual in light of the passage of the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993 c.38 ("Bill 117") on February 14, 1994. That Act repeals the *Crown Employees Collective Bargaining Act*, R.S.O. 1990, c.50 the legislation which would have applied to these employees with respect to labour relations matters but for Bill 117.
3. Upon convening the hearing, the parties were agreed that the panel deal first with an issue of jurisdiction. There is a dispute between the parties as to whether issues between them are properly raised before this Board or whether they are properly before the Public Service Labour Relations Tribunal (the "Tribunal"). This decision deals with that issue only. The parties were able to agree to the facts they thought relevant for our determination. They can be summarized as follows.
4. The Amalgamated Transit Union, Local 1587 (the "ATU") was certified by the Tribunal in or about 1981 to represent a bargaining unit of employees of GO Transit described as follows:

ARTICLE 2 - RECOGNITION

2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer employed in the Province of Ontario, save and except supervisors and foremen

and persons above the rank of supervisor and foreman, office and technical staff and persons excluded by the *Crown Employees Collective Bargaining Act*, R.S.O. 1972, c.67, as amended.

5. The latest collective agreement between the ATU and GO Transit expired December 17, 1993. The recognition clause found in that collective agreement read as follows:

ARTICLE 2 - RECOGNITION

2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer employed in the Province of Ontario as specified in Schedule A, save and except supervisors and forepersons and persons above the rank of supervisor and foreperson, office and technical staff and persons excluded by the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c.108, as amended.

6. On or about August 24th, 1993, the ATU gave notice to GO Transit of its desire to bargain with a view to a renewal of that collective agreement. As of the date of hearing, GO Transit and the ATU had not renewed that collective agreement.

7. The parties were agreed that the circumstances set out in section 57 of Bill 117 exist in that:

- (a) Notice to bargain was given by the ATU before section 57 of Bill 117 was proclaimed into force;
- (b) A collective agreement between GO Transit and the ATU had not been reached by the date upon which 57(1) of Bill 117 came into force;
- (c) GO Transit and the ATU have not agreed that the provisions of the *Crown Employees Collective Bargaining Act*, R.S.O. 1990, c.50 (the "old Act") ceased to apply;
- (d) The bargaining unit represented by the ATU is not a bargaining unit established under section 23 of Bill 117.

* * *

8. Bill 117 came into effect on February 14, 1994. Reference to the "old Act" is reference to the *Crown Employees Collective Bargaining Act* R.S.O. 1990, c.50. The provisions of Bill 117 referred to provide as follows:

PART II

APPLICATION OF LABOUR RELATIONS ACT

Application of <i>Labour Relations Act</i>	2.-(1) This Act sets out modifications to the application of the <i>Labour Relations Act</i> with respect to Crown employees.
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Act part of the <i>Labour Relations Act</i>	(2) This Act shall be deemed to form part of the <i>Labour Relations Act</i> for the purposes of the application of the <i>Labour Relations Act</i> with respect to Crown employees.
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Bargaining	57.-(1) If notice to bargain is given under subsection 8(1) or 22(1) of the old Act before this subsection comes into force but a collective agreement
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has not been made, the old Act continues to apply until a collective agreement is made.

Exception (2) Despite subsection (1), the parties may agree that the old Act ceases to apply before the collective agreement is made.

Exception (3) This section does not apply with respect to a bargaining unit established under section 23.

Ontario Public Service Labour Relations Tribunal 59.-(1) In this section, "Tribunal" means the Ontario Public Service Labour Relations Labour Tribunal.

Tribunal (2) The Tribunal is continued for the purposes of disposing of any matters in respect of which an application was made to the Tribunal before the repeal of the old Act.

Dissolution of Tribunal (3) The Tribunal is dissolved on the day it disposes of the last of the matters referred to in subsection (2) or on a later day named by proclamation of the Lieutenant Governor.

Old Act continues to apply (4) Despite its repeal, the provisions of the old Act that relate to the Tribunal continue to apply with respect to the Tribunal and to the matters before it until the Tribunal is dissolved.

Reconsideration (5) While the Tribunal is continued, it may reconsider anything under section 39 of the old Act and, after it is dissolved, the Ontario Labour Relations Board may reconsider anything done by the Tribunal.

Existing application if undertaking transferred (6) If an undertaking is transferred, within the meaning of section 10, while an application is before the Tribunal for representation rights in respect of the employees employed in the undertaking or for a declaration that a trade union no longer represents the employees, the application shall be transferred to the Board and the employer to whom the undertaking is transferred is the employer for the purposes of the application.

Act of the Tribunal (7) Anything done by the Tribunal shall be deemed, after the old Act is repealed, to have been done by the Ontario Labour Relations Board.

Repeals 62.-(1) the *Crown Employees Collective Bargaining Act* is repealed.

We have noted the marginal notes indicated in the legislation as the parties made reference to them in argument.

9. Sections 39 and 40 of the repealed *Crown Employees Collective Bargaining Act* provided:

39. The Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, and, except as otherwise provided in this Act, the action or decision of the Tribunal thereon is final and binding for all purposes, but nevertheless the Tribunal may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

40.-(1) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the

question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

(2) If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under this Act, either party or the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes.

* * *

10. The initial dispute that arises in the context of the application for certification is the question of whether or not the employees applying for certification are already represented by the ATU in the bargaining unit described above. It is the position of the employer and the ATU that the enforcement officers form part of the bargaining unit already represented by the ATU. In support of that position they rely (essentially) on three matters. They rely on the original certificate granting an all employee bargaining unit, the existing recognition clause in the context of their bargaining history, and thirdly, they rely on a written agreement dated March 22,, 1994 which was entered into during the course of the current negotiations between GO Transit and the ATU and which provides as follows:

Reference: Article 2 - Recognition Clause

Under the Recognition Clause, Article 2 and Schedule A of the current Collective Agreement, it is agreed that the Employer recognizes the Union as the exclusive bargaining agent as stipulated in the Article and Schedule, and further agrees that the agreement is amended to include Uniformed Transit Enforcement Officers.

It is further agreed that should it be necessary a separate schedule will be drawn up similar to the Bus Driver's schedule for such matters pertaining solely to this classification, i.e. Uniformed Transit Enforcement Officers. Such a schedule will form part of the Collective Agreement and will require to refer to the "essential services" criteria in order to arrive at a negotiated "essential classification list" who will not be able to take part in "legal strikes".

These matters subject to the satisfactory completion of the current negotiations.

11. It is the position of the applicant in the certification application that this group of employees is unrepresented and that there is no bar to it bringing the certification application at this time. It is brought under section 5 of the *Labour Relations Act* (the "Act"). In the alternative, the applicant seeks to attack what it argues is a voluntary recognition agreement entered into on March 22, 1994 expanding the ATU's then existing bargaining rights to include this group of employees without their support. Therefore, Board File No. 0572-94-R seeks to challenge that agreement pursuant to section 61 of the *Labour Relations Act*.

* * *

12. GO Transit and the ATU commenced their argument on the issue of jurisdiction with section 57 of Bill 117. They argued that because the pre-conditions set out in that section exist in the particular circumstances, the old Act continues to apply until they enter into a new collective agreement. Any question therefore concerning the right of the ATU or the applicant to represent this particular group of employees ought to be considered under the terms of the old Act and by the Tribunal. While acknowledging that section 57 does not specifically indicate that matters fall within the jurisdiction of the Tribunal, both argued that it is implicit in the continuing of the old Act that the exclusive jurisdiction of the Tribunal continue as well. It is arguable that there is some logic to that proposition in that the Tribunal is familiar with its then enabling legislation, has experience in interpreting and applying that legislation, and can make determinations in respect of that

legislation appropriate to the circumstances. There seems little dispute between the parties that if section 57 applies, the old Act may affect the issue of whether bargaining rights with the ATU exist for this group of employees and thereby affect the applications under the *Labour Relations Act*.

13. GO Transit and the ATU both further made the point that these matters arise in the context of the ongoing bargaining between them and that while the marginal note is for convenience only, if it has any bearing on the proper statutory interpretation to be given to the section, both rely on the fact that one of the key issues in bargaining was the status of these enforcement officers and their recognition within the bargaining unit and their terms and conditions of employment. The further logic behind section 57 it was argued, is that parties will not engage in dealings with one another under one set of rules only to be shifted to another set of rules mid-stream. We note that the circumstances reference that normal time period relating to collective bargaining.

14. In response the applicant argued that it is not caught by section 57 and is properly before the Board because the issue raised by the applications is not a matter of bargaining. Rather, it argued the issue to be determined is a question of representation, and whether or not any pre-existing rights obtain which would interfere with the applicant's ability to proceed with its applications. The applicant stated that if the matter in issue were one of bargaining, for example, bargaining in bad faith, and the conditions under section 57 were met, the matter would proceed under the old Act and that the Tribunal would have jurisdiction to hear that matter. The applicant distinguished these circumstances by arguing that the matter was not one of bargaining but was one of representation rights.

15. Sub-section 59(2) of Bill 117 continues the Tribunal for the purposes of disposing of any matter in respect of which an application had been made to the Tribunal prior to February 14, 1994. All parties were agreed that if the Tribunal had received an application prior to February 14, 1994 it would continue to be seized with the hearing of that matter (subject to sub-section 59(6)). No such application had been made to the Tribunal concerning these parties prior to that time.

16. GO Transit and the ATU noted that while no application had been filed to the Tribunal either by way of a certification application or an application to terminate bargaining rights, that right arises and continues to exist pursuant to section 57 given the timing of events. There are provisions under the old *Crown Employees Collective Bargaining Act* for dealing with applications for representation rights (section 2) and for dealing with termination of representation rights (section 24). The parties were agreed that under the old Act there was no specific provision for voluntary recognition agreements as recognized by the *Labour Relations Act*. An application for representation rights under the old *Crown Employees Collective Bargaining Act* was determined in all cases by the holding of a vote among the employees concerned.

17. Although not expressly argued by the applicant, the panel did inquire of the parties as to their views of the effect of sub-section 59(2). GO Transit and the ATU distinguished sections 57 and 59. While sub-section 59(2) gives the Tribunal jurisdiction to hear a matter of which it is already seized, GO Transit and the ATU argued that that is not exhaustive; that section 57 gives the Tribunal jurisdiction over another set of circumstances; those issues which arise while the pre-conditions set out in section 57 exist. Therefore, under section 57 the matter does not need to have been commenced prior to February 14, 1994 in order for the jurisdiction to vest with the Tribunal. Merely that the circumstances set out in section 57 must exist.

18. GO Transit and the ATU argued that this interpretation is supported by sub-section 59(3) which contemplates that the Tribunal will continue even after those matters which would have been disposed of pursuant to sub-section 59(2) have been dealt with. It contemplates the possibility of the dissolution of the Tribunal on a later day.

19. In support of its argument that this matter involves representation rights and is a matter therefore that goes to the Board, the applicant relied on section 59(6). It argued that where there is a transfer of an undertaking which resulted in a representation rights dispute, even where the application was already before the Tribunal, that issue is to go the Board. Sub-section 59(6) contemplates that an application is already before the Tribunal involving representation rights and that only on the event of a transfer of the undertaking does the jurisdiction shift from the Tribunal to the Board. GO Transit and the ATU argued that the sub-section supports their position in that it provides a specific circumstance wherein jurisdiction will be transferred from the Tribunal to the Board.

20. Both GO Transit and the ATU acknowledged that depending on a determination by the Tribunal as to the issue of whether or not the ATU holds bargaining rights for this group of employees, the matter may return to the Board to be dealt with under the *Labour Relations Act*. However, both argued that the Board cannot assume the jurisdiction to make any initial determination with respect to bargaining rights in the context of these applications; that that jurisdiction properly falls to the Tribunal under the provisions of the old Act. It is the Tribunal that is best equipped to interpret its own original certificate and to apply the terms of the old Act to the existing circumstances.

21. We note that the characterization of the issue as either a matter of bargaining or as a matter of having entered into a voluntary recognition agreement really amounts to a determination of the very issue that is in dispute. Whether or not there were pre-existing bargaining rights or whether the agreement of March 22nd reflects recognition of pre-existing bargaining rights or an independent and voluntary recognition of bargaining rights is precisely the issue that the parties seek to have heard. If the matter only arose as a question of whether the ATU had pre-existing bargaining rights, the termination application would be redundant. The termination application only arises as an alternative position should it be determined that the ATU holds bargaining rights pursuant to a voluntary recognition agreement entered into on March 22, 1994. The applicant argued that section 57 of Bill 117 must refer to matters that were within the scope of the old Act and, given there was not provision for voluntary recognition under the old Act, the parties would not be entitled to enter into the March 22, 1994 agreement. However, that too may be an issue that may be required to be determined in the context of the dispute between the parties.

* * *

22. The parties spent some time in trying to characterize what was at issue, that being, a question or a matter that arises in bargaining or a question of representation rights. The underlying issue in these applications is a question of whether or not the ATU already holds bargaining rights for this group of employees, as everyone acknowledges that will affect the applicant's ability to proceed further. It is also clear that the issue came to a head during the course of bargaining between GO Transit and the ATU and particularly so in light of the agreement reached between GO Transit and the ATU dated March 22, 1994. However, we are less sure that trying to characterize the problem one way or the other really assists us in determining the issue of jurisdiction.

23. At the outset we note that there appears to be no obvious logic or labour relations rationale to weigh heavily in support of one position or the other. Certainly the legislation itself is not as clear as it might be in its direction as to which forum is responsible for determining the issues that arise as a result of these applications.

24. The applicant says section 57 does not apply because this is not a matter of bargaining. There is obvious logic in pursuing negotiations under one set of rules. What might not have been anticipated by the legislation is the necessity of determining a third party's rights in the context of,

and during those negotiations. However, the circumstances outlined in section 57 do exist. There is no limitation in sub-section 57(1) that the old Act continue to apply, for example, "in respect of matters relating to bargaining". We would be reluctant to read in such a limitation. The marginal note is ambiguous at best. It could refer to issues arising in bargaining or the time frame for bargaining. The direction in the legislation is that the old Act continue to apply until the event of making a collective agreement, regardless of what issue might arise. We are unable to see how we can ignore section 57 and conclude that it does not apply in the circumstances.

25. However, section 57 does not give clear direction as to forum. The employer and the ATU argued that by carrying on the old Act, the exclusive jurisdiction of the Tribunal is implicitly carried forward as well. That is the strongest argument in support of the position that these matters are properly before the Tribunal. It incorporates the view that the Tribunal may be in a better position to interpret its own certificate and subsequent events under that legislation. However, it ignores it seems, or runs into conflict with, the provisions of section 2 of Bill 117. That section makes Bill 117, including the transitional provisions, part of the *Labour Relations Act* for the purposes of the application of that Act to Crown employees. The *Labour Relations Act* gives exclusive jurisdiction to the Board to determine all matters of fact and law arising under that Act, which now includes those relevant provisions of Bill 117.

26. The preferable starting point for determining which tribunal has jurisdiction is, in our view, section 59, which talks specifically about the Tribunal and outlines the purposes for which the Tribunal is continued. While by no means clear, it does continue certain matters before the Tribunal. Implicit in its reading is the conclusion that all other matters will properly fall to the Board for determination. Certainly the thrust of the legislation as a whole is to that effect.

27. Under sub-section 59(2) the Tribunal is continued for the purposes of disposing of any matters in respect of which an application had been made to the Tribunal prior to the repeal of the old Act. The old Act was repealed by the enactment of Bill 117 on February 14, 1994. These applications were not filed until May, 1994 and are therefore not before the Tribunal under sub-section 59(2). No applications had been filed with the Tribunal prior to February 14, 1994. In essence, it is difficult to describe these matters as "outstanding" or "left over". These are new applications. The applicant is seeking to represent a group of employees. In order to do so, it must respond to the assertion that another trade union already holds bargaining rights for the employees. That issue only arises because of the new application. With the enactment of Bill 117, the repeal of the old Act, and the contemplated dissolution of the Tribunal, it seems somewhat surprising to conclude that the Tribunal would still "be in the business" of dealing with new requests for representation rights. It would also be artificial to require the applicant to now make an application before the Tribunal because the circumstances set out in section 57 exist. That would be inconsistent with sub-section 59(2), given that any such application would be made to the Tribunal after the repeal of the old Act.

28. Sub-section 59(4) continues the provisions of the old Act that relate to the Tribunal "with respect to the Tribunal and to the matters before it" and makes no reference to the Board. Were the Board to be applying the old Act, it is arguable that sub-section 59(4) might continue the provisions of the old Act both with respect to the Tribunal *and* to the Board and those matters before it that arise under the old Act. On the other hand, it is arguably a "housekeeping" or "saving" provision which enables the Tribunal to have a continued existence and legislative structure while dealing with remaining applications which the Board would not require given the provisions of the *Labour Relations Act*.

29. Sub-section 59(6) provides a circumstance where, although jurisdiction would have

fallen to the Tribunal under sub-section 59(2), that jurisdiction is taken away and given to the Board on the event of a transfer of undertaking. The provision arguably supports both positions, although it seems to weigh more heavily in support of a conclusion that the Board hear these matters. It further narrows the range of matters that are to be heard by the Tribunal, even where the matter was commenced before the Tribunal and before the repeal of the old Act. We note that in that circumstance, while forum is clear, a similar problem appears, in that it does not seem entirely clear whether the old Act or Bill 117 and the *Labour Relations Act* would apply.

30. Sub-section 59(7) deems anything done by the Tribunal after February 14, 1994 to have been done by the Board and is consistent with the general transition of jurisdiction to the Board, even though the Tribunal would have been acting pursuant to the old Act.

31. It may be that it was not anticipated that the old Act apply to the circumstances here; that section 57 was directed primarily at bargaining concerns. If so, it may seem unusual for the Board to be placed in a position of having to consider the old Act, although the oddity may be the application of the old Act and not the forum, given that the general thrust of the legislation is to place matters before the Board. There are other situations where the Board is required to interpret legislation other than the *Labour Relations Act*. A somewhat analogous example perhaps is if there is a sale of a business which results in a change of jurisdiction from federal to provincial authority. The Board might be required to interpret the provisions of the *Canada Labour Code* in order to determine what bargaining rights existed in the federal scheme in order to determine what rights, if any, had transferred.

32. Bill 117 also contemplates that the Board may be asked to consider and apply the old Act under sub-section 59(5) which allows the Board to reconsider a decision of the Tribunal after the latter's dissolution.

33. On balance, we are persuaded that the provisions of Bill 117 are properly interpreted so as to conclude that it is the Board that determines the issues arising in these applications. The matter is transitional only as a result of the particular timing in light of section 57. The Board may be required to consider the provisions of the old Act.

34. These matters are referred to the Registrar. We direct that these matters be set down for hearing on an expedited basis. Given the parties' agreement and the consent of the Board at the hearing, the Registrar is to contact the parties with respect to this expedited scheduling. This panel is not seized.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2622-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bemar Construction (Ontario) Inc. (Respondent) v. Labourers International Union of North America, Local 506 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of Bemar Construction (Ontario) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Bemar Construction (Ontario) Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

2625-91-R: Labourers International Union of North America, Local 506 (Applicant) v. Bemar Construction (Ontario) Inc. (Respondent) v. Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all construction labourers in the employ of Bemar Construction (Ontario) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Bemar Construction (Ontario) Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

3579-92-R: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., A Division of Royplast Limited (Respondent) v. Samuel Ofose Ansah (Intervener)

Unit: "all employees of Royalguard Vinyl Co., A Division of Royplast Limited in the City of Vaughan, save and except foreperson, persons above the rank of foreperson, office, clerical and sales staff" (104 employees in unit) (*Having regard to the agreement of the parties*)

3260-93-R: IWA-Canada (Applicant) v. Colquhoun Audio Laboratories Limited (Respondent)

Unit: "all employees of Colquhoun Audio Laboratories Limited at the Village of Dwight, save and except Production Manager and persons above the rank of Production Manager" (24 employees in unit) (*Having regard to the agreement of the parties*)

3499-93-R: International Brotherhood of Electrical Workers (Applicant) v. Association for Persons with Physical Disabilities - Resident Care (Respondent)

Unit: "all employees of the Association for Persons with Physical Disabilities - Residence Care in the City of Windsor, save and except Administrator, persons above the rank of Administrator, Attendant Care Program

Manager, Service Co-ordinator and Administrative Assistant and Financial Co-ordinator" (22 employees in unit) (*Having regard to the agreement of the parties*)

3531-93-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. The Belleville Intelligencer, a Division of Thomson Newspapers Company Limited (Respondent)

Unit: "all employees of The Belleville Intelligencer, a division of Thomson Newspapers Company Limited, in the City of Belleville, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of the Ontario Labour Relations Act" (109 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3905-93-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Haliburton (Respondent)

Unit: "all employees of The Corporation of the County of Haliburton in the County of Haliburton, save and except foremen, persons above the rank of foremen, secretary to the County Engineer, Assistant to the Land Division Secretary and secretary to the Clerk Treasurer, secretary to the Director Social Services and employees in bargaining units for which any trade union held bargaining rights as of February 14, 1994" (9 employees in unit) (*Having regard to the agreement of the parties*)

4114-93-R: United Food and Commercial Workers International Union (Applicant) v. Mazzuca Groceteria Ltd. (Respondent) v. 1074046 Ontario Limited (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of 1074046 Ontario Limited in the Town of Capreol, save and except Assistant Store Manager and persons above the rank of Store Manager, Grocery Manager, Produce Manager, Meat Manager and office staff" (39 employees in unit) (*Having regard to the agreement of the parties*)

4472-93-R: United Steelworkers of America (Applicant) v. QL Systems Limited (Respondent)

Unit: "all employees of QL Systems Limited employed in the City of Kingston, save and except supervisors, and persons above the rank of supervisor" (49 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4527-93-R: United Steelworkers of America (Applicant) v. Distinctive Designs Furniture Inc. (Respondent)

Unit: "all employees of Distinctive Designs Furniture Inc. in the Municipality of Metropolitan Toronto, save and except Forepersons, persons above the rank of Foreperson, Sample Maker, Maintenance Engineer, office, clerical and sales staff and persons in bargaining units for which any trade union held bargaining rights as of March 31, 1994" (94 employees in unit) (*Having regard to the agreement of the parties*)

0141-94-R: United Steelworkers of America (Applicant) v. Dabber Bingo Holdings Inc. and 587141 Ontario Limited (Respondents)

Unit: "all employees of Dabber Bingo Holdings Inc. and 587141 Ontario Limited in the Regional Municipality of Hamilton-Wentworth, save and except Session Managers and persons above the rank of Session Manager" (26 employees in unit) (*Having regard to the agreement of the parties*)

0175-94-R: Labourers International Union of North America, Local 506 (Applicant) v. Tri-Krete Limited (Respondent)

Unit: "all employees of Tri-Krete Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and employees for whom any trade union held bargaining rights as of April 18, 1994" (21 employees in unit) (*Having regard to the agreement of the parties*)

0209-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Arrow Moulded Plastics of Canada Ltd. (Respondent)

Unit: "all employees of Arrow Moulded Plastics of Canada Ltd. in the Town of Leamington, save and except supervisors, persons above the rank of supervisor, Quality Assurance Auditors, Engineers, Senior Mould

Technicians, office, clerical and sales staff" (282 employees in unit) (*Having regard to the agreement of the parties*)

0228-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Industrial Electrical Services Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Industrial Electrical Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Industrial Electrical Services Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit)

0242-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Coolsaet Pipeline Ltd. (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener)

Unit: "all employees of Coolsaet Pipeline Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Coolsaet Pipeline Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0272-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in cleaning, recycling and maintenance at Dofasco Inc. in the City of Hamilton and the City of Stoney Creek, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (45 employees in unit) (*Having regard to the agreement of the parties*)

0285-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cote & C.R.T. Inc. (Respondent)

Unit: "all employees of Cote & C.R.T. Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Cote & C.R.T. Inc. in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0311-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Holiday Inns of Canada Limited c.o.b. as Crowne Plaza Toronto Centre (Respondent)

Unit: "all employees employed as Night Auditors by Holiday Inns of Canada Limited c.o.b. as Crowne Plaza Toronto Centre at the Crown Plaza Toronto Centre, 225 Front Street West, in the Municipality of Metropolitan Toronto, save and except Night Audit Supervisor, persons above the rank of Night Audit Supervisor, persons in bargaining units for which any trade union held bargaining rights as of April 29, 1994 and students employed during the school vacation period" (3 employees in unit)

0314-94-R: Canadian Security Union (Applicant) v. 547573 Ontario Limited operating as Norpro Company (Respondent)

Unit: “all security officers in the employ of 547573 Ontario Limited operating as Norpro Company at 45-3 Line West (Lajambe Forest Products), at 75 Huron Street (St. Mary’s Paper Inc.), and at Queen Street West (Lake Superior Power Co-Generation Plant) in the City of Sault Ste. Marie, save and except supervisors and persons above the rank of supervisor” (17 employees in unit) (*Having regard to the agreement of the parties*)

0333-94-R: United Steelworkers of America (Applicant) v. Multicraft Holdings Ltd. (Respondent)

Unit: “all employees of Multicraft Holdings Ltd. at its location at 2210 Thurston Drive in the City of Ottawa, save and except Managers, persons above the rank of Manager, bookkeeper, and office and clerical staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

0359-94-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Wilf Schon Masonry Ltd. (Respondent)

Unit: “all construction labourers in the employ of Wilf Schon Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Wilf Schon Masonry Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0488-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Inc. engaged in building cleaning and maintenance at J.I. Case 450 Sherman Avenue North in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0531-94-R: London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Central Park Lodges Ltd. - Victoria Place (Respondent)

Unit: “all employees of Central Park Lodges Ltd. - Victoria Place in the City of Kitchener, save and except supervisors and persons above the rank of supervisor” (47 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0548-94-R: Local Union 47 Sheet Metal Workers’ International Association (Applicant) v. James Johnston Mechanical Contracting Ltd. (Respondent)

Unit: “all journeymen and apprentice sheet metal workers in the employ of James Johnston Mechanical Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of James Johnston Mechanical Contracting Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0550-94-R: United Steelworkers of America (Applicant) v. 732118 Ontario Inc. c.o.b. as LOEB Club Plus Nortown (Respondent)

Unit: “all employees of 732118 Ontario Inc. c.o.b. as LOEB Club Plus Nortown in the City of Chatham regularly employed for not more than 24 hours per week, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff” (121 employees in unit) (*Having regard to the agreement of the parties*)

0551-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 632371 Ontario Limited c.o.b. as Carewell Brighton Nursing Home (Respondent)

Unit: “all employees of 632371 Ontario Limited c.o.b. as Carewell Brighton Nursing Home in the Town of Brighton, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, Day

Charge Nurse and persons for which any trade union held bargaining rights as of May 13, 1994" (4 employees in unit) (*Having regard to the agreement of the parties*)

0558-94-R: Amalgamated Transit Union, Local 1572 (Applicant) v. McDonnell-Ronald Limousine Service Limited c.o.b. as Airline Limousine (Respondent)

Unit: "all dependant contractors of McDonnell-Ronald Limousine Service Limited c.o.b. as Airline Limousine, in its limousine service working in and out of the Municipality of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors and those above the rank of supervisor" (277 employees in unit) (*Having regard to the agreement of the parties*)

0589-94-R: The Ontario Pipes Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicants) v. Canadian Erectors Construction Services Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Canadian Erectors Construction Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Canadian Erectors Construction Services Inc. in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

0606-94-R: Brewery, General and Professional Workers' Union (Applicant) v. National Furniture Restorers (London) Limited (Respondent)

Unit: "all employees of National Furniture Restorers (London) Limited, in the City of London and the County of Middlesex, save and except supervisors, persons above the rank of supervisor and front office staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

0612-94-R: International Ladies Garment Workers Union (Applicant) v. Youth Clinical Services Inc. (Respondent)

Unit: "all employees of Youth Clinical Services Inc. in the Municipality of Metropolitan Toronto, save and except Executive Director and persons above the rank of Executive Director" (11 employees in unit) (*Having regard to the agreement of the parties*)

0619-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: "all employees of Hallmark Housekeeping Services Inc. at 77 Bloor Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (19 employees in unit) (*Having regard to the agreement of the parties*)

0624-94-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. Hanley Foods Inc. c.o.b. as LOEB Walker Place (Respondent)

Unit: "all Meat Department employees of Hanley Foods Inc. c.o.b. as LOEB Walker Place in the City of Burlington, save and except Meat Manager, persons above the rank of Meat Manager and persons regularly employed for not more than 24 hours per week" (7 employees in unit) (*Having regard to the agreement of the parties*)

0625-94-R: Service Employees Union - Local 532, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. The Hamilton Young Women's Christian Association (Respondent)

Unit: "all employees of The Hamilton Young Women's Christian Association employed in the service to the Developmentally Handicapped Department in the City of Hamilton, save and except Managers, persons

above the rank of Manager and office staff” (66 employees in unit) (*Having regard to the agreement of the parties*)

0643-94-R: Ontario Nurses’ Association (Applicant) v. Clarion Nursing Homes Limited (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by Clarion Nursing Homes Limited in the Town of Stoney Creek, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons in bargaining units for which any trade union held bargaining rights as of May 20, 1994” (9 employees in unit) (*Having regard to the agreement of the parties*)

0644-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Trican Materials Limited (Respondent)

Unit: “all employees of Trican Materials Limited in the County of Essex, save and except manager, persons above the rank of manager, office and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0694-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Town of New Tecumseth (Respondent)

Unit: “all employees of The Corporation of the Town of New Tecumseth in its Parks and Recreation and Culture Department in the Town of New Tecumseth, save and except managers, persons above the rank of manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

0695-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. 1022603 Ontario Inc. (Respondent)

Unit: “all construction labourers in the employ of 1022603 Ontario Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0697-94-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Sanitary Maintenance Systems (Respondent)

Unit: “all employees of Sanitary Maintenance Systems employed at 20 Dundas Street West, 40 Dundas Street West and 595 Bay Street (known as Atrium on Bay) in the City of Toronto, save and except forepersons, and persons above the rank of foreperson” (48 employees in unit) (*Having regard to the agreement of the parties*)

0701-94-R: United Steelworkers of America (Applicant) v. Tenneco Heavy Duty Brake Ltd. (Respondent)

Unit: “all employees of Tenneco Heavy Duty Brake Ltd. in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (145 employees in unit) (*Having regard to the agreement of the parties*)

0704-94-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Capital Properties Limited Partnership c.o.b. as Travelodge Ottawa East (Respondent)

Unit: “all employees of Capital Properties Limited Partnership c.o.b. as Travelodge Ottawa East in the City of Gloucester, save and except Managers and persons above the rank of Manager” (27 employees in unit) (*Having regard to the agreement of the parties*)

0722-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Sault Ste. Marie (Respondent)

Unit: “all employees of The Corporation of the City of Sault Ste. Marie in the City of Sault Ste. Marie, at its

Municipal Day Care Centres, save and except Assistant Supervisors, persons above the rank of Assistant Supervisor and employees in bargaining units for which any trade union held bargaining rights as of May 30th, 1994" (16 employees in unit) (*Having regard to the agreement of the parties*)

0741-94-R: United Food and Commercial Workers International Union (Applicant) v. BABN Technologies Inc. (Respondent)

Unit #1: "all employees of BABN Technologies Inc. in the City of Sault Ste. Marie, save and except Team Leaders, persons above the rank of Team Leader, Security Guards, Quality Control Staff, sales, office, clerical and maintenance staff" (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all security guards of BABN Technologies Inc. in the City of Sault Ste. Marie, save and except Supervisors and persons above the rank of Supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0749-94-R: Service Employees Union Local 268 Affiliated with the S.E.I.U. A.F. of L., C.I.O. and C.L.C. (Applicant) v. Centre for the Developmentally Challenged of Thunder Bay and District (Respondent)

Unit: "all employees in the Community Activity Department of the Centre for the Developmentally Challenged of Thunder Bay and District in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of May 27, 1994" (8 employees in unit) (*Having regard to the agreement of the parties*)

0760-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent)

Unit: "all employees of Hotel Employees Restaurant Employees Union, Local 75, in the Province of Ontario, save and except officers and persons in bargaining units for which any trade union held bargaining rights as of May 31, 1994" (5 employees in unit) (*Having regard to the agreement of the parties*)

0762-94-R: Canadian Union of Professional Security-Guards (Applicant) v. Hamilton-Wentworth Protection Services (1991) Ltd. (Respondent)

Unit: "all employees of Hamilton-Wentworth Protection Services (1991) Ltd. employed as security guards at Camco, 175 Longwood Road; Henderson Hospital, 711 Concession Street; and Proctor-Gamble, Burlington Street, in the City of Hamilton, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (40 employees in unit) (*Having regard to the agreement of the parties*)

0775-94-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Sodexho Canada Inc. (Respondent)

Unit: "all employees of Sodexho Canada Inc. at 250 Lanark Ave., in the City of Ottawa, save and except Chef/Manager and persons above the rank of Chef/Manager" (2 employees in unit) (*Having regard to the agreement of the parties*)

0802-94-R: Ontario Public Service Employees Union (Applicant) v. The Great War Memorial Hospital of Perth District (Respondent) v. Group of Employees (Objectors)

Unit: "all paramedical employees of The Great War Memorial Hospital of Perth District in the Town of Perth, save and except Supervisors, persons above the rank of Supervisor, Professional Medical Staff and persons for whom any trade union held bargaining rights as of June 2, 1994" (13 employees in unit) (*Having regard to the agreement of the parties*)

0808-94-R: International Association of Bridge, Structural and Ornamental Iron Workers and Iron Workers District Council of Ontario (Applicant) v. Vision Almet Limited (Respondent)

Unit: "all iron workers and iron workers' apprentices in the employ of Vision Almet Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all iron work-

ers and iron workers' apprentices in the employ of Vision Almet Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

0809-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Oakdale Cleaners & Maintenance Ltd. (Respondent)

Unit: "all employees of Oakdale Cleaners & Maintenance Ltd. employed at Lime Ridge Mall, 999 Upper Wentworth Street in the City of Hamilton, save and except non-working forepersons and persons above the rank of non-working foreperson" (18 employees in unit) (*Having regard to the agreement of the parties*)

0810-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Qualico Foods Inc. (Respondent)

Unit: "all employees of Qualico Foods Inc. employed at 4480 Palletta Court in the City of Burlington, save and except foremen, persons above the rank of foreman, laboratory, office and clerical staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

0811-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc., engaged in building cleaning and maintenance at the Canada Post Corporation, 393 Millen Avenue and Depot #3, 383 Barton Street East, in the City of Stoney Creek, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

0812-94-R: Brewery, General and Professional Workers' Union (Applicant) v. Dundurn Community Legal Service (Respondent)

Unit: "all employees of Dundurn Community Legal Service in the City of Hamilton, save and except the Executive Director, persons above the rank of Executive Director and any person employed in a confidential capacity with respect to labour relations" (5 employees in unit) (*Having regard to the agreement of the parties*)

0813-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. Fairview Fittings & Manufacturing Limited (Respondent)

Unit: "all employees of Fairview Fittings & Manufacturing Limited in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office, sales and clerical staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

0821-94-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders International Union (Applicant) v. Wheat Sheaf Tavern Limited (Respondent)

Unit: "all employees of Wheat Sheaf Tavern Limited in the Municipality of Metropolitan Toronto, save and except Manager, persons above the rank of Manager, hotel employees and employees in bargaining units for whom any trade union held bargaining rights as of June 7, 1994, specifically those employees covered by the

collective agreement between the Applicant and Responding party effective September 1, 1993 to August 31, 1996" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0831-94-R: Ontario Public Service Employees Union (Applicant) v. Iroquois Falls Association for Community Living (Respondent)

Unit: "all employees of Iroquois Falls Association for Community Living in the Regional District of Cochrane, save and except Supervisors, persons above the rank of Supervisor and French Language Services Secretary/Receptionist" (34 employees in unit) (*Having regard to the agreement of the parties*)

0832-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Nikom Electronics Corporation (Respondent)

Unit: "all employees of Nikom Electronics Corporation in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff, Engineers and Engineering Technicians" (192 employees in unit) (*Having regard to the agreement of the parties*)

0840-94-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Nine Twenty-One Millwood (Respondent)

Unit: "all employees of Nine Twenty-one Millwood in the City of Toronto, save and except Supervisors, persons above the rank of Supervisor, Activity Director, Director of Care, Cook/Supervisor, office and clerical staff and students employed during the summer school vacation period" (32 employees in unit) (*Having regard to the agreement of the parties*)

0850-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Marli Mechanical Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Marli Mechanical Ltd. in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*)

0851-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Serviplast Inc. (Respondent)

Unit: "all employees of Serviplast Inc. in the City of Brampton, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of June 8th, 1994" (6 employees in unit) (*Having regard to the agreement of the parties*)

0885-94-R: Ontario Public School Teachers' Federation (Applicant) v. The Hastings County Board of Education (Respondent)

Unit: "all occasional teachers employed by The Hastings County Board of Education in its elementary panel in the County of Hastings, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the School Boards and Teachers Collective Negotiations Act" (205 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0077-94-R: Christian Labour Association of Canada (Applicant) v. Lifestyle Retirement Communities Partnership - c.o.b. as Beechwood Place Retirement Residences (Respondent)

Unit: "all employees of Lifestyle Retirement Communities Partnership - c.o.b. as Beechwood Place Retirement Residences at 1490 and 1500 Rathburn Road East in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (94 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	104
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	82
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	36

0106-94-R: Canadian Union of Public Employees (Applicant) v. University of Windsor (Respondent)

Unit: "all lay employees of the University of Windsor in the City of Windsor employed for not more than twenty hours per week, save and except foreman, persons above the rank of foreman, stationary engineers, persons engaged as helpers to engineers, Conference Services, Human Kinetics, security guards, office and clerical staff and persons for whom any trade union held bargaining rights as of April 11, 1994" (217 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	235
Number of persons who cast ballots	68
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	63
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	2

0145-94-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all Seniors Daytime Program Instructors of the Continuing Education Department of the Toronto Board of Education in the City of Toronto, save and except Lead Instructors, persons above the rank of Lead Instructor, persons engaged as teachers within the meaning of the Education Act, Secretary to the Administrator, and persons for whom any trade union held bargaining rights as of April 13, 1994" (138 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	142
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	7

0362-94-R: Independent Paperworkers of Canada (Applicant) v. Domtar Packaging, a division of Domtar Inc. (Keele St.) (Respondent) v. IWA Canada (Intervener)

Unit: "all employees of Domtar Packaging, A Division of Domtar Inc. (Keele St.) including maintenance staff, located at 7700 Keele St. in Concord, Ontario, save and except foremen, persons above the rank of foreman, office, sales office, stock clerk, and security officers" (140 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	152
Number of persons who cast ballots	119
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names appear on voters' list	
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	100
Number of ballots marked in favour of intervener	17

Ballots segregated and not counted

0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2346-93-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Bradson Mercantile Inc. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices in the employ of Bradson Mercantile Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices in the employ of Bradson Mercantile Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (28 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	1

4044-93-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Canadian Tire Petroleum (Respondent)

Unit: "all employees of Canadian Tire Petroleum at 508 W. Arthur Street in the City of Thunder Bay, save and except the Manager and persons above the rank of Manager" (11 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	3

0353-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. Hydro-Electric Commission of the Town of Dryden (Respondent) v. Local Union 1730, International Brotherhood of Electrical Workers (Intervener)

Unit: "Sub Foreman, Journeyman Lineman, Apprentice, Groundman, Basic Labourer, Temporary Labourer" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	2

0355-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Kenora Hydro Electric Commission (Respondent) v. Local Union 559, International Brotherhood of Electrical Workers (Intervener)

Unit: "Line Foreman, Journeyman "A", Meter Repairman/Journeyman "B", Journeyman "B", Apprentices, Equipment Operator, Meter Reader, Labourer, Groundman, excluding persons regularly employed for not more than 24 hours per week" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8

Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	0

0387-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 800 (Applicant) v. Live Entertainment of Canada Inc. (Respondent)

Unit: "all wig, makeup and hair stylists employed by the Live Entertainment of Canada Inc. at the Pantages Theatre in the Municipality of Metropolitan Toronto, save and except Assistant Technical Director and persons above the rank of Assistant Technical Director" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

4530-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all security guards employed by Group 4 C.P.S. Limited in the Municipality of Metropolitan Toronto and the City of Mississauga, save and except supervisors, persons above the rank of supervisor and persons in bargaining units for which any trade union held bargaining rights as of March 31, 1994" (101 employees in unit)

0186-94-R: International Brotherhood of Painters & Allied Trades Local 1795 Glaziers (Applicant) v. Polar Glass & Mirror Inc. (Respondent)

0322-94-R: Ontario Liquor Boards Employees' Union (Applicant) v. The Municipality of Metropolitan Toronto, Metropolitan Toronto Civic Employees' Union, Local 43, Canadian Union of Public Employees, Local 79 (Respondents)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3366-92-R: Foyer Richelieu Employees Independent Union (Applicant) v. Foyer Richelieu Welland (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit #1: "tous les employés du foyer Richelieu, situé dans la ville de Welland à l'exception de l'administration, le personnel médical professionnel, les infirmières licenciées et les infirmières étudiantes, les pharmaciens licenciés, les diététistes, le personnel clérical et de bureaux, les surveillants ainsi que les personnes qui occupent des postes supérieurs à celui de surveillant." (32 employees in unit)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	30

0226-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Jellco Packaging Corp. (Respondent)

Unit #1: "all employees of Jellco Packaging Corp., in the City of Barrie, save and except supervisors, persons

above the rank of supervisor, office and clerical, sales, engineering, persons employed for not more than 24 hours per week and students employed during the school vacation period" (62 employees in unit)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	39

0323-94-R: International Brotherhood of Electrical Workers (Applicant) v. JIC Electric Canada A Division of Con-Syst-Int Group Inc. (Respondent)

Unit #1: "all employees of Con-Syst-Int Group Inc. at its JIC Electric Canada Division in the Township of Sandwich South, save and except foremen and persons above the rank of foreman, sales, office and clerical staff" (53 employees in unit)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	21
Number of ballots segregated and not counted	12

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2976-93-R: Canadian Union of Public Employees (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent)

Unit: "all employees of the Ottawa Roman Catholic Separate School Board in the City of Ottawa, regularly employed for not more than 24 hours per week as English as a Second Language Instructors, save and except Vice-Principals, persons above the rank of Vice-Principal and employees in bargaining units for which any trade union held bargaining rights as of November 24, 1993" (25 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	6

3977-93-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Talisman Mountain Resort Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all hotel and restaurant employees of Talisman Mountain Resort Ltd. and Euphrasia Township save and except managers, persons above the rank of manager, maitre d'hotel, executive chef, sous chefs, chefs de parti(e), pastry chef, executive housekeeper, sales and accounting staff, reservations and front desk staff, night audit. and administrative staff and security guards." (234 employees in unit)

Number of names of persons on revised voters' list	100
Number of persons who cast ballots	71
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	51
Number of ballots segregated and not counted	5

0011-94-R: Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (Applicant) v. Central Supply Co. 1972 Ltd. c.o.b. Centura Floor & Wall Fashion (Respondent)

Unit: "all employees of the Responding Party in the City of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, sales, office and clerical staff" (33 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	0

0017-94-R: Local Union 636 of the International Brotherhood of Electrical Workers (I.B.E.W.) (Applicant) v. Fiberglas Canada Inc. (Respondent) v. Amalgamated Clothing and Textile Workers Union (A.C.T.W.U.) Local 1305 (Intervener)

Unit: "all hourly rated employees of Fiberglas Canada Inc. at its Guelph Glass Plant in the City of Guelph, save and except foremen, persons above the rank of foreman, office staff, guards, technicians, technical control centre staff and field service staff" (335 employees in unit)

Number of names of persons on revised voters' list	367
Number of persons who cast ballots	310
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	310
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	140
Number of ballots marked in favour of intervener	165

0149-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Champlain Energies Ltd. (Respondent)

Unit: "all employees of Champlain Energies Ltd. employed as Truck Drivers working in and out of the company's yards at 1460 Chemong Road in the City of Peterborough and 850 Champlain Avenue in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, dispatchers, office and sales staff" (15 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	9

Applications for Certification Withdrawn

2085-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Massicotte Bros. Construction Ltd. (Respondent)

4064-93-R; 4065-93-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Sanitary Maintenance Co. Ltd. (Respondent)

0024-94-R: K.S. Centoco Employees Union (Applicant) v. K.S. Centoco Ltd. (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Intervener)

0257-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Coolsaet Pipeline Ltd. (Respondent)

0416-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent) (*Withdrawn*)

0430-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Metric Excavating Ltd. (Respondent) v. Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen And Helpers (Intervener)

0431-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. Whitby Hydro Electric Commission (Respondent) v. Local Union 636, International Brotherhood of Electrical Workers (Intervener)

0489-94-R: Ontario Public Service Employees Union (Applicant) v. Peel Non-Profit Housing Corporation (Respondent)

0543-94-R: Communications, Energy and Paperworkers Union of Canada Local 80-0 (Applicant) v. Entreprises Desmarais Forever Enterprise (Respondent)

0651-94-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Lifestyle Retirement Communities Partnership c.o.b. as Donway Retirement Residences and Senior Apartments (Respondent)

0655-94-R: Canadian Union of Public Employees (Applicant) v. United Counties of Prescott-Russell (Respondent)

0658-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Coolsaet Pipeline Ltd. (Respondent)

0675-94-R: United Steelworkers of America (Applicant) v. 608507 Ontario Inc. (Respondent)

0804-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Villeneuve Construction Co. Ltd. (Respondent)

0820-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent)

0839-94-R: Service Employees International Union, Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Lifestyle Retirement Communities Partnership c.o.b. as Donway Place Retirement Residences and Seniors Apartments (Respondent)

0852-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses-Eastern Counties Branch (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3343-93-R: Canadian Union of Public Employees and its Local 2037 (Applicant) v. Caressant Care Nursing Home of Canada, Limited (Respondent) (*Granted*)

4183-93-R: Canadian Union of Public Employees Local 1146 (Applicant) v. The Corporation of the City of Woodstock (Respondent) (*Granted*)

4184-93-R: Canadian Union of Public Employees Local 1348 (Applicant) v. The Essex County Board of Education (Respondent) (*Granted*)

0453-94-R: Canadian Union of Public Employees Local 1508 (Applicant) v. Corporation of the County of Renfrew (Respondent) (*Granted*)

0544-94-R: Communications, Energy and Paperworkers Union of Canada Local 80-0 (Applicant) v. Entreprises Desmarais Forever Enterprise (Respondent) (*Withdrawn*)

0819-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent) (*Withdrawn*)

FIRST AGREEMENT - DIRECTION

0566-94-FC: Canadian Union of Public Employees Local 207 (Applicant) v. Walden Public Library Board (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1630-91-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493 (Applicant) v. N.L. Smith Construction Ltd., N.L. Smith Construction Group Inc., Neil Smith Construction Limited, Nordal Construction Limited, Auburn Contractors Inc., Brendan Construction Limited, Master Brendan Industrial Services Limited (Respondents) v. United Steelworkers of America (Intervener) (*Endorsed Settlement*)

0564-92-R; 0565-92-R; 1835-92-R: International Brotherhood of Painters and Allied Trades, Locals 205 and 1824 (Applicant) v. Robertson-Yates Corporation Limited and Greenington Group Ltd. (Respondents); International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Robertson-Yates Corporation Limited and Greenington Group Ltd. (Respondents); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 67 (Applicant) v. Robertson-Yates Corporation Limited and Greenington Group Ltd. (Respondents) (*Dismissed*)

1459-92-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Johnson Controls Limited, Wellington County Board of Education (Respondents) (*Withdrawn*)

3176-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Store Builders Inc., General Commercial Construction Inc., General-Adcom Inc. (Respondents) (*Endorsed Settlement*)

4424-93-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. 1116-3615 Quebec Inc., Suss Woodcraft International Inc., Annaterr Construction Inc., Julius Suss, Marcus Suss, Bella Suss and Samuel Suss, (Respondents) (*Endorsed Settlement*)

0224-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.T.C. Flooring Limited and Dan Seyeau carrying on business as Spec Flooring (Respondents) (*Endorsed Settlement*)

0556-94-R: United Food and Commercial Workers Union, Local 206 (Applicant) v. 1032544 Ontario Inc. (Respondent) (*Withdrawn*)

0610-94-R: Teamsters Local Union 938 (Applicant) v. City Peel Taxi, 7-11 Taxi, Inter-Cab Inc., Mississauga Taxi (Respondents) (*Withdrawn*)

0730-94-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Ambor Electric Ltd., 105590 Ontario Ltd. c.o.b. as G.G. Electric (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1630-91-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493 (Applicant) v. N.L. Smith Construction Ltd., N.L. Smith Construction Group Inc., Neil Smith Construction Limited, Nordan Construction Limited, Auburn Contractors Inc., Brendan Construction Limited, Master Brendan Industrial Services Limited (Respondents) v. United Steelworkers of America (Intervener) (*Endorsed Settlement*)

0564-92-R; 0565-92-R; 1835-92-R: International Brotherhood of Painters and Allied Trades, Locals 205 and 1824 (Applicant) v. Robertson-Yates Corporation Limited and , Greenington Group Ltd. (Respondents); International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Robertson-Yates Corporation Limited and Greenington Group Ltd. (Respondents); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 67 (Applicant) v. Robertson-Yates Corporation Limited and Greenington Group Ltd. (Respondents) (*Dismissed*)

1459-92-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Johnson Controls Limited, Wellington County Board of Education (Respondents) (*Withdrawn*)

0032-93-R: International Brotherhood of Electrical Workers, and Local 586, IBEW, IBEW Construction (Applicant) v. Drycore Electric Inc. (Respondent) (*Dismissed*)

3176-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Store Builders Inc., General Commercial Construction Inc., General-Adcom Inc. (Respondents) (*Endorsed Settlement*)

4424-93-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. 1116-3615 Quebec Inc., Suss Woodcraft International Inc., Annaterr Construction Inc., Julius Suss, Marcus Suss, Bella Suss and Samuel Suss, (Respondents) (*Endorsed Settlement*)

0224-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.T.C. Flooring Limited and Dan Seyeau carrying on business as Spec Flooring (Respondents) (*Endorsed Settlement*)

0556-94-R: United Food and Commercial Workers Union, Local 206 (Applicant) v. 1032544 Ontario Inc. (Respondent) (*Withdrawn*)

0730-94-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Ambor Electric Ltd., 105590 Ontario Ltd. c.o.b. as G.G. Electric (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2151-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Hudson's Bay Company (Respondent) (*Granted*)

3717-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent) (*Terminated*)

0628-94-R: Canadian Union of Public Employees (Applicant) v. Sisters of Charity of Ottawa Health Services (Respondent) v. Independent Canadian Transit Union and its Local 9 (Intervener) (*Withdrawn*)

0848-94-R: Independent Canadian Transit Union and its Local 9 (Applicant) v. Sisters of Charity of Ottawa Health Services (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4021-93-R: Royal Shirt Employees (Concord) (Applicant) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Royal Shirt Co. Ltd. (Intervener) (*Dismissed*)

0188-94-R: Keith Ardelian and Dave Brooks (Applicant) v. United Steelworkers of America (Respondent) v. Hemlo Gold Mines Inc. (Intervener)

Unit: “all employees of Helmo Gold Mines Inc. located approximately 36.5 kilometres east of the Town of Marathon, save and except supervisors, persons above the rank of supervisor, office, clerical, technical, sales, security staff and students employed during the school vacation period” (219 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	225
Number of persons who cast ballots	218
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	218
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	107
Number of ballots marked against respondent	110

0273-94-R: Pamela Blais (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Retail, Wholesale and Department Store Union AFL:CIO:CLC:) (Respondent) v. Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Intervener) (*Withdrawn*)

0424-94-R: Marina Medina (Applicant) v. Labourers International Union of North America (Respondent) v. Sabra Property Management (Intervener) (*Withdrawn*)

0428-94-R: Lenlie O'Brien, Manuel Dos Santos and International Union of Operating Engineers, Local 793 (Applicants) v. Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (Respondent) v. Metric Excavating Ltd. (Intervener) (*Withdrawn*)

0657-94-R: Brian D. Moyer (Applicant) v. Teamsters Local #879 (Respondent) v. Crane Canada Inc; Crane Supply Division (Intervener) (*Granted*)

0673-94-R: Christopher George Veldhuis (Applicant) v. United Food & Commercial Workers International Union Local 1000A (Respondent) v. Bavarian Meat Products Ltd. (Intervener) (*Withdrawn*)

0706-94-R: Board of Management of The O'Keefe Centre for the Performing Arts c.o.b. The O'Keefe Centre (Applicant) v. Canadian Union of Public Employees (Respondent) (*Granted*)

0744-94-R: Jason Good (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Respondent) v. Leon's Furniture Limited (Intervener) (*Granted*)

0909-94-R: Alan Wong Employee of Suisha Gardens, on behalf of all Employees (Applicant) v. Hospitality and Service Trades Union, Local 261 (Respondent) v. Suisha Gardens (Ottawa) Ltd. (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1071-94-U: QBD Cooling Systems Inc. (Applicant) v. Canadian Union of Operating Engineers and General Workers, Local 101 and Stefan Dunin-Borkowski (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0881-94-U: Goreski Roofing and Lathing Ltd. (Applicant) v. Canadian Union of Shinglers and Allied Workers, and Robert Schewell, Harold Biso and Steve Wolfreys (Respondent) (*Endorsed Settlement*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1018-94-U: Amalgamated Clothing and Textile Workers Union Local 740 (Applicant) v. Rennie Inc. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2019-88-U; 3122-88-U: United Steelworkers of America (Applicant) v. Plaza Fiberglas Manufacturing Limited, Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., Sabina Citron (Respondents); United Steelworkers of America (Applicant) v. Plaza Fiberglas Manufacturing Limited, Plaza Electro-Plating Ltd., Sabina Citron (Respondents) (*Terminated*)

2683-91-U: Carpenters & Allied Workers, Local 27 of the United Brotherhood of Carpenters and Joiners of America and Labourers International Union of North America, Local 506 (Applicants) v. Bemar Construction (Ontario) Inc. (Respondent) (*Granted*)

0823-92-U: Southern Ontario Newspaper Guild (Applicant) v. Metroland Printing, Publishing and Distributing (Respondent) (*Granted*)

1626-92-U: Louis Lauzon (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Respondent) (*Granted*)

2334-92-U: Eugenie Levy (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Versa-Care Limited (Intervener) (*Dismissed*)

3235-92-U: IWA Canada, Local 2693 (Applicant) v. E.B. Eddy Forest Products Limited (Respondent) (*Withdrawn*)

0773-93-U; 0774-93-U; 1362-93-U: Mary Anne Green, CAW Local 222 Union Member (Applicant) v. John Caines, CAW Local 222 Union Plant Chairperson (Respondent) v. General Motors of Canada Limited ("GMCL") (Intervener); Mary Anne Green, CAW Local 222 Union Member (Applicant) v. B. ("Buzz") Hargrove CAW National Union President (Respondent) v. General Motors of Canada Limited ("GMCL") (Intervener); Mary Anne Green (Applicant) v. B. (Buzz) Hargrove, CAW Union National President; John P. Caines, CAW Local 222 Plant Chairperson (Respondents) v. General Motors of Canada Limited ("GMCL") (Intervener) (*Dismissed*)

0974-93-U: Covington Clarke (Applicant) v. Local 400 F.W.D. - International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO/La-Z-Boy Canada Limited (Respondents) (*Dismissed*)

1428-93-U: James A. F. Cowan (Applicant) v. Ford Motor Company of Canada Ltd. (Respondent) (*Dismissed*)

2339-93-U: Mirza Alam, Brian Ames, Mahmood Ansari, Mohd Aslam, Bruce Boulton, Robert Campbell, Ashton Caspersz, Jana Cibulka, Ed Foden, Arthur Gleghorn, Nikolas Ilkos, Joe Karol, Steve Kirilovic, Antony Korsman, Shu-Tak Kwan, Fred La Roche, Mahendar Makim, Carolyn Oaks, Raj Puri, Vince Rist, Phil Russell, Danny Samson, Frank Sindelar, Hank Teeuwissen, Stan Trakalo, Bill Tyndall, Michael Wong (Applicants) v. Power Workers' Union - CUPE Local 1000 (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)

- 2680-93-U:** Eva Aceti (Applicant) v. Office and Professional Employees International Union Local 343 (Respondent) (*Dismissed*)
- 2894-93-U:** Fred Dixon (Applicant) v. Smith Falls Community Hospital (Respondent) (*Dismissed*)
- 2981-93-U:** Staff of Information Services Department (Local 673) de Havilland Inc. (Applicant) v. National Automobile, Aerospace and CAW-Canada Local 673 Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. de Havilland Inc. (Intervener) (*Withdrawn*)
- 3296-93-U:** James O'Donnell (Applicant) v. Graphic Communications International Union, Local N-1 (Respondent) v. Paragon Industrial Photographic Reproductions Ltd. (Intervener) (*Withdrawn*)
- 3398-93-U:** United Food and Commercial Workers International Union, Local 175 and 633 (Applicant) v. Pharmaphil, A Division of R.P. Scherer Canada Inc. (Respondent) (*Dismissed*)
- 3442-93-U:** Office and Professional Employees International Union Local 343 (Applicant) v. Workplace Health and Safety Agency (Respondent) (*Withdrawn*)
- 3530-93-U:** Ime Rotondi (Applicant) v. Canadian Union of Public Employees Local 2026 (Respondent) v. The Dufferin - Peel Roman Catholic Separate School Board (Intervener) (*Withdrawn*)
- 3664-93-U:** Jack Vernon et al (Applicants) v. CAW-Canada Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)
- 3758-93-U:** Power Workers Union, CUPE Local 1000 (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)
- 3833-93-U:** John Warwood and Steve Farrow (Applicants) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1081 (Respondent) v. Pickard Construction (1991) (Intervener) (*Dismissed*)
- 3838-93-U:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Toronto Star Newspapers Limited (Respondent) (*Withdrawn*)
- 4025-93-U:** Ms. Denise Coade (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)
- 4033-93-U:** Jerry McDougall (Applicant) v. Labourers International Union of North America, Local 506 (Respondent) (*Dismissed*)
- 4185-93-U:** Ahzard Mohammed (Applicant) v. Metropolitan Toronto Civic Employees' Union, Local 43 (Respondent) v. Corporation of the City of Toronto (Intervener) (*Dismissed*)
- 4198-93-U:** Canadian Union of Public Employees, Local 3685 (Applicant) v. Halton Roman Catholic School Board (Respondent) (*Terminated*)
- 4271-93-U:** United Food and Commercial Workers International Union (Applicant) v. Loeb Club Plus Capreol (Respondent) (*Withdrawn*)
- 4323-93-U:** International Brotherhood of Electrical Workers (Applicant) v. Association for Persons with Physical Disabilities - Resident Care (Respondent) (*Withdrawn*)
- 4325-93-U:** United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Massicotte Bros. Construction Ltd. (Respondent) (*Withdrawn*)
- 4351-93-U:** Mitech Plastics Corporation (Applicant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 1132 AFL-CIO-CLC (Respondent) (*Withdrawn*)

4375-93-U: Marcel Dagenais (Applicant) v. Canadian Union of Public Employees, Local 152, Lincoln County Board of Education (Respondents) (*Terminated*)

4392-93-U: Ontario Public Service Employees Union (Applicant) v. Women's Shelter of Georgina, Inc. (Respondent) (*Withdrawn*)

4396-93-U: Satia Rajah (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)

4449-93-U: Janine Dunk (Applicant) v. Canadian Union of Public Employees Local 1097, George Wilson and Hotel Dieu Hospital (Respondents) (*Withdrawn*)

4465-93-U: Mark Andrusky (Applicant) v. Rust Check (Respondent) (*Withdrawn*)

4467-93-U: Louis Tremblay (Applicant) v. Rust Check (Respondent) (*Withdrawn*)

0039-94-U: London and District Service Workers Union, Local 220 (Applicant) v. Metcalfe Gardens Retirement Home (Respondent) (*Withdrawn*)

0046-94-U: Canadian Union of Public Employees and its Local 2451 (Applicant) v. Bert Grimard and Marriott Corporation of Canada Limited (Respondent) (*Dismissed*)

0107-94-U: The Canadian Union of Public Employees' Local 1369 C.L.C. (Applicant) v. The Sudbury District Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

0130-94-U: Zeljko Sljukic (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

0177-94-U: Tesfaye Teklearegay (Applicant) v. L.I.U.N.A. Local 183, Apcoa Parking Limited (Respondents) (*Withdrawn*)

0178-94-U; 0179-94-U: Mary Anne Green, CAW Local 222 Union Member (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (1) National Union, (2) Local 222 Union (Respondents); Mary Anne Green (Applicant) v. General Motors of Canada Ltd. (Respondent) (*Dismissed*)

0212-94-U: International Ladies Garment Workers Union (Applicant) v. Limité - Bigi (Limité Store #45) (Respondent) (*Withdrawn*)

0236-94-U: Gordon H. Duffy (Applicant) v. Thyssen Marathon Canada Ltd. (Respondent) (*Dismissed*)

0237-94-U: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Township of Limerick (Respondent) (*Withdrawn*)

0239-94-U: Donna Kendall (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0261-94-U: Kimi Park (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Delta Chelsea Inn (Intervener) (*Dismissed*)

0317-94-U: Communications, Energy and Paperworkers Union of Canada and its Local 333-17 (Applicant) v. Birch Glen Co-Operative Homes Inc. (Respondent) (*Withdrawn*)

0326-94-U: John Clark (Applicant) v. The Great Atlantic and Pacific Company of Canada Limited c.o.b. as Dominion Stores Limited (Respondent) (*Withdrawn*)

0339-94-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

the United States and Canada, Local Union 819 (Applicant) v. 655270 Ontario Inc. c.o.b. as Eastern Welding (Respondent) (*Dismissed*)

0415-94-U: O.P.S.E.U. Members, G.S.B. File #2713B/90 #2713C/90 Schuler et al (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Management Board Secretariat (Intervener) (*Withdrawn*)

0417-94-U; 0419-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent) (*Withdrawn*)

0466-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

0490-94-U: Anthony Broos, Perry MacInnis, Kurtis Kaufman (Applicants) v. Bramalea Limited (Respondent) (*Withdrawn*)

0502-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Dryden and District Association for Community Living (Respondent) (*Withdrawn*)

0514-94-U: Horst Stanzlik (Applicant) v. Daniel J. Webster, Jr. and CAW National Representative, Local 397 (Respondent) (*Withdrawn*)

0524-94-U: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Township of Herschel (Respondent) (*Endorsed Settlement*)

0533-94-U: Communications, Energy and Paperworkers Union of Canada, Local 28-0 (Applicant) v. Dupont Canada Inc. (Respondent) (*Withdrawn*)

0534-94-U: International Ladies' Garment Workers' Union (Applicant) v. 717536 Ontario Inc. c.o.b. as 2001 Futon Inc. (Respondent) (*Withdrawn*)

0538-94-U: Ontario Public Service Employees Union (OPSEU) (Applicant) v. The Crown in Right of Ontario as represented by The Ministry of Community and Social Services (Respondent) (*Withdrawn*)

0539-94-U: Canadian Union of Public Employees Local 1909 (Applicant) v. Ross Memorial Hospital (Respondent) (*Withdrawn*)

0545-94-U: Wendy Burns (Applicant) v. CAW, Local 1285 (Respondent) (*Withdrawn*)

0547-94-U: Canadian Union of Public Employees, Local 1033 (Applicant) v. St. Joseph's Hospital and Home (Respondent) (*Withdrawn*)

0557-94-U: Amalgamated Transit Union, Local 1572 (Applicant) v. McDonnell-Ronald Limousine Service Limited carrying on business as Airline Limousine (Respondent) (*Withdrawn*)

0559-94-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Industrial Electrical Services Inc. (Respondent) (*Endorsed Settlement*)

0565-94-U: John Craig (Applicant) v. United Steelworkers (Respondent) (*Withdrawn*)

0656-94-U: Canadian Union of Public Employees Local 3678 (Applicant) v. Quadrille Development Corporation c.o.b. The Residence on the St. Clair (Respondent) (*Withdrawn*)

0660-94-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Second Generation Furnishing Inc. (Respondent) (*Withdrawn*)

0662-94-U: Maple Lodge Farms Ltd. Garage Employees (Bargaining Unit) (Applicant) v. United Food and Commercial International Local 175 AFL-CIO-CLC (Respondent) (*Withdrawn*)

0667-94-U: Daniel Joseph Gormley (Applicant) v. Metropolitan Toronto Civic Employees Union (Local 43) (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Withdrawn*)

0676-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Champlain Energies Limited (Respondent) (*Withdrawn*)

0685-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Montgomery Lodge (Respondent) (*Withdrawn*)

0710-94-U: Gina Kostro (Applicant) v. Central Hospital (Respondent) (*Withdrawn*)

0732-94-U: Christine Solomon (Applicant) v. Commonwealth Hospitality Ltd. (Respondent) (*Dismissed*)

0747-94-U: Amarjit Singh, Satnam Kooner (Applicants) v. Super Plastics Co. Ltd. (Respondent) (*Withdrawn*)

0758-94-U: United Food & Commercial Workers Union, Locals 175 and 633 (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) (*Endorsed Settlement*)

0765-94-U: Office and Professional Employees International Union (Applicant) v. Timmins and District Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

0779-94-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Holiday Inn, Toronto Airport (Respondent) (*Withdrawn*)

0861-94-U: CUPE & its Local 2357 (Applicant) v. O.R.C.S.S.B. (Respondent) (*Withdrawn*)

0866-94-U: Nelson Andrews (Applicant) v. CAW Local 1967 (Respondent) (*Dismissed*)

0874-94-U: Service Employees International Union, Local 204 (Applicant) v. A & B Courier (Respondent) (*Withdrawn*)

0875-94-U: Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351 (Applicant) v. Holiday Inns of Canada Limited c.o.b. as Crowne Plaza Toronto Centre (Respondent) (*Endorsed Settlement*)

1084-94-U: Canadian Union of Operating Engineers and General Workers Local 101 (Applicant) v. QBD Cooling Systems Inc. (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

0743-94-M: IWA Canada, Local 2693 (Applicant) v. Taiga Trucking Ontario (1980) Inc. (Respondent) (*Withdrawn*)

0873-94-M: Service Employees International Union, Local 204 (Applicant) v. A & B Courier (Respondent) (*Withdrawn*)

0940-94-M: Royalguard Vinyl Co., a division of Royplast Limited (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

0973-94-M: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Basile Interiors Ltd. (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0463-94-M: Canadian Linen Supply (Ottawa) (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0575-94-M: St. Catharines Place Retirement Home (Employer) v. Christian Labour Association of Canada (Trade Union) (*Granted*)

0674-94-M: Strano Foods, 723779 Ontario Limited (Employer) v. Christian Labour Association of Canada (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1831-93-JD: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Matthews Contracting Inc. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener) (*Dismissed*)

2584-93-JD; 2658-93-JD; 2659-93-JD; 2660-93-JD; 2661-93-JD; 2662-933-JD: International Association of Bridge, Structural and Ornamental Ironworkers, International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro, Canadian Union of Public Employees, Local 1000 (Respondents); Labourers' International Union of North America, Labourers' International Union of North America, Local 1059 (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; and Canadian Union of Public Employees, Local 1000 (Respondents); International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; and Canadian Union of Public Employees, Local 1000 (Respondents); Ontario Allied Construction Trades Council (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; and Canadian Union of Public Employees, Local 1000 (Respondents); United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America, Local 2222 (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; and Canadian Union of Public Employees, Local 1000 (Respondents); United Brotherhood of Carpenters and Joiners of America, Millwright District Council of Ontario (Applicant) v. Electrical Power Systems Construction Association; Ontario Hydro; and Canadian Union of Public Employees, Local 1000 (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3990-93-M: Workplace Health and Safety Agency (Applicant) v. Office and Professional Employees International Union, Local 343 (Respondent) (*Withdrawn*)

4386-93-M: Golfview Group Homes Ltd. (Applicant) v. The Canadian Union of Public Employees Local 2225-11 (Respondent) (*Dismissed*)

0593-94-M: International Brotherhood of Electrical Workers' Local Union 636 (Applicant) v. Thorold Hydro-Electric Commission (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2941-92-OH: Canadian Union of Public Employees Local 185 (Applicant) v. City of Etobicoke (Respondent) (*Withdrawn*)

3264-93-OH: Glyn Frost and Marchesa Balloi (Applicant) v. Simcoe County Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

4277-93-OH; Stanislaw Mielec (Applicant) v. Upwardor Corp. (Respondent) (*Dismissed*)

4338-93-OH; 0080-94-OH: Gary Kearse (Applicant) v. Roger Champagne, East Ferris Bus Lines Ltd. (Respondents); George Kranich (Applicant) v. Roger Champagne, East Ferris Bus Lines, (Respondent) (*Withdrawn*)

4466-93-OH: Mark Andrusky (Applicant) v. Rust Check (Respondent) (*Withdrawn*)

4468-93-OH: Louis Tremblay (Applicant) v. Rust Check (Respondent) (*Withdrawn*)

0474-94-OH: Brent A. Cook (Applicant) v. E. S. Fox Ltd. Steve Pelton Dave Doan (Respondent) (*Withdrawn*)

0677-94-OH: Lisa Mason (Applicant) v. Terry Kraft, Brenda Kraft, SBR Printing (Respondents) (*Withdrawn*)

0678-94-OH: Wendy Dunn (Applicant) v. Dilwol Wire and Cable Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

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ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1994



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A Monthly Series of Decisions from the
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Change in Working Conditions - Interim Relief - Related Employer - Remedies - Unfair Labour Practice - Board making interim order directing employer to rescind or suspend operation of new arrangements affecting employees pending determination of union's complaint or expiration of "freeze", whichever first occurs

CHECKER LIMOUSINE AND AIRPORT SERVICE, G. HANLON HOLDINGS INC., G.J. HANLON ("HANLON") AND J. ORENDORFF, 947465 ONTARIO LTD., C.O.B. AS; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCALS 414, 422, 440, 448, 461, 483, 488, 1000 AND 1688 991

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THE BRICK WAREHOUSE CORPORATION; RE SEU LOCAL 268, AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C. 1116

Charges - Certification - Evidence - Intimidation and Coercion - Membership Evidence - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE SAMUEL OFOSU ANSAH; RE USWA 1057

Charter of Rights and Freedoms - Constitutional Law - Duty of Fair Representation - School Boards and Teachers Collective Negotiations Act - Unfair Labour Practice - Board rejecting submission that section 2(1)(f) of the *Labour Relations Act* violating section 7 of the Charter by depriving teachers of the right to bring complaints of unfair representation

against their bargaining agent - Board without jurisdiction to deal with application - Application dismissed

GRANT TADMAN; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION TORONTO SECONDARY UNIT; RE METROPOLITAN SEPARATE SCHOOL BOARD 1096

Collective Agreement - Certification - Pre-Hearing Vote - Timeliness - Trade Union Status - Staff Association wishing to displace CUPE as bargaining agent for employees of Board of Education - Staff Association found to be trade union within meaning of *Labour Relations Act* - Board concluding that extension of collective agreement to March 31, 1996 pursuant to section 35 of *Social Contract Act* making staff association's certification application untimely

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Combination of Bargaining Units - Bargaining Unit - Practice and Procedure - Remedies - Board in earlier decision combining full-time and part-time units and remaining seized to deal with further relief - Union subsequently asking Board to set matter down for hearing with respect to remedial relief - Before listing matter for hearing, Board directing union to provide it and employer with detailed description of orders or remedies requested and detailed statement of all material facts on which it relies in accordance with Rule 12 - Employer directed to reply within seven days and to supply information required by Rule 14

MARRIOTT CORPORATION (AT CARLETON UNIVERSITY); RE CUPE AND ITS LOCAL 2451 1016

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THE NORTH BAY NUGGET, A DIVISION OF SOUTHAM INC.; RE NORTH BAY NEWSPAPER GUILD, LOCAL 241, THE NEWSPAPER GUILD (CLC, AFL-CIO) 1137

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GRANT TADMAN; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION TORONTO SECONDARY UNIT; RE METROPOLITAN SEPARATE SCHOOL BOARD 1096

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SHIRLON PLASTICS INC.; RE UFCW, AFL/CIO, CLC 1086

Discharge - Duty of Fair Representation - Unfair Labour Practice - Employee complaining about union's failure to advance his grievance to arbitration - Board noting that employee's complaint premature and that fact that a grievance does not go to arbitration does not, in itself, establish any arguable breach of the Act - Board exercising its discretion not to inquire into complaint - Complaint dismissed

GEORGE LEE; RE LOCAL 75, UNION REPRESENTATIVE CLEDWYN LONGE 1009

Discharge - Health and Safety - Applicant employed as office cleaner suffering from thyroid condition - Employer requiring its employees to wear uniform including bow-tie tied around neck - Applicant's thyroid condition aggravated by anything around her neck - Employer suspending applicant for wearing bow-tie at third button of her blouse - Board concluding that applicant honestly and reasonably refused to wear item of clothing in manner she believed would endanger her health - *Occupational Health and Safety Act* applying in circumstances where health and safety risk identified by worker is risk to her as a result of disability - Employer directed to reinstate applicant to former position with full compensation and to permit applicant to wear bow-tie clipped at third button of uniform

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BASILE INTERIORS LTD.; RE PAT, LOCAL 1494 963

Discharge for Union Activity - Certification - Certification Where Act Contravened - Change in Working Conditions - Discharge - Interference in Trade Unions - Unfair Labour Practice - Board finding that company did not violate Act in discharging union supporter or three managers, and that a number of other allegations not established - Employer violating Act in telling employee that he could not solicit for union on company property, promising to clear discipline records, removing last names from work schedules and time cards and offering Christmas bonus to employees as inducement to avoid dealing with union and thus interfering with union's organizing drive - Board inviting submissions on whether it ought to determine application under "old" section 8 of the Act before hearing adjourned unfair labour practice complaint - Board remaining seized as to all remedial matters

PRICE CLUB WESTMINSTER; PRICE CLUB ST. LAURENT INC. C.O.B. AS; RE UFCW, LOCAL 175 1029

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SHIRLON PLASTICS INC.; RE UFCW, AFL/CIO, CLC 1086

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GRANT TADMAN; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION TORONTO SECONDARY UNIT; RE METROPOLITAN SEPARATE SCHOOL BOARD

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Duty of Fair Representation - Discharge - Unfair Labour Practice - Employee complaining about union's failure to advance his grievance to arbitration - Board noting that employee's complaint premature and that fact that a grievance does not go to arbitration does not, in itself, establish any arguable breach of the Act - Board exercising its discretion not to inquire into complaint - Complaint dismissed

GEORGE LEE; RE LOCAL 75, UNION REPRESENTATIVE CLEDWYN LONGE

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Employee - Certification - Board finding that certain persons attending safety orientation session on date of certification application not employees at work on that date and properly excluded from list of employees

MAIDSTONE MANUFACTURING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)

1011

Evidence - Certification - Charges - Intimidation and Coercion - Membership Evidence - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE SAMUEL OFOSU ANSAH; RE USWA.....

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Evidence - Practice and Procedure - Reconsideration - Union Successor Status - Objecting employees seeking reconsideration of Board's decision declaring Steelworkers' to be successor union to RWDSU on grounds that the employer had posted no notice of the proceeding in the workplace - At conclusion of objecting employees' case, employer making motion for early dismissal of the reconsideration application - Board reviewing jurisprudence and policy considerations associated with procedures for facilitating swift, balanced hearings which combine expedition and full opportunity to be heard - Board not requiring employer or Steelworkers' to make election as to whether to call evidence or not, but dismissing employer's motion

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE RWDSU, AFL-CIO-CLC AND ITS LOCAL AFFILIATES RWDSU AFL-CIO-CLC, LOCAL 414, 429, 545, 579, 582, 915 AND 991; RE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA, LOCAL 414.....

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Interim Relief - Interference in Trade Unions - Intimidation and Coercion - Remedies - Trusteeship - Unfair Labour Practice - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed	
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THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE UFCW, LOCALS 175 AND 633 AND SHELLY FAIR SERVICE, SCOTT CONSTABLE, PEGGY SWIFT AND GARY DIMOCK.....

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Interference in Trade Unions - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Intimidation and Coercion - Remedies - Unfair Labour Practice - Employer violating Act in threatening and intimidating one employee with respect to union membership and in laying off second employee because of his union activity - Reinstatement with compensation ordered - Board determining that as result of employer's violations true wishes of employees unlikely to be ascertained - Union certified under section 9.2 of the Act

BASILE INTERIORS LTD.; RE PAT, LOCAL 1494

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Interference with Trade Unions - Certification - Certification Where Act Contravened - Intimidation and Coercion - Remedies - Unfair Labour Practice - Employer found to have violated Act by certain statements contained in bulletins distributed to employees, certain statements made by employer at meeting with employees, and by certain statements made to two employees about soliciting support for the union - Board directing employer to post and distribute Board notice to employees, to permit union access to plant during working hours for purpose of convening meeting with employees out of presence of members of management, and to rescind written warnings given to two employees - Board declining to certify union under section 9.2 of the Act - Representation vote directed

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Interference in Trade Unions - Certification - Certification Where Act Contravened - Change in Working Conditions - Discharge - Discharge for Union Activity - Unfair Labour Practice - Board finding that company did not violate Act in discharging union supporter or three managers, and that a number of other allegations not established - Employer violating Act in telling employee that he could not solicit for union on company property, promising to clear discipline records, removing last names from work schedules and time cards and offering Christmas bonus to employees as inducement to avoid dealing with union and thus interfering with union's organizing drive - Board inviting submissions on whether it ought to determine application under "old" section 8 of the Act before hearing adjourned unfair labour practice complaint - Board remaining seized as to all remedial matters

PRICE CLUB WESTMINSTER; PRICE CLUB ST. LAURENT INC. C.O.B. AS; RE UFCW, LOCAL 175.....

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Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Trusteeship - Unfair Labour Practice - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

WESTBURY HOWARD JOHNSON HOTEL ["THE WESTBURY"], AND H.E.R.E. ["THE PARENT UNION"]; RE H.E.R.E., LOCAL 75 ["LOCAL 75"].....

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Intimidation and Coercion - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer violating Act in threatening and intimidating one

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BASILE INTERIORS LTD.; RE PAT, LOCAL 1494 963

Intimidation and Coercion - Remedies - Certification - Certification Where Act Contravened - Interference with Trade Unions - Unfair Labour Practice - Employer found to have violated Act by certain statements contained in bulletins distributed to employees, certain statements made by employer at meeting with employees, and by certain statements made to two employees about soliciting support for the union - Board directing employer to post and distribute Board notice to employees, to permit union access to plant during working hours for purpose of convening meeting with employees out of presence of members of management, and to rescind written warnings given to two employees - Board declining to certify union under section 9.2 of the Act - Representation vote directed

CANAC KITCHENS LIMITED; RE CJA 972

Intimidation and Coercion - Certification - Charges - Evidence - Membership Evidence - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE SAMUEL OFOSU ANSAH; RE USWA..... 1057

Intimidation and Coercion - Interference in Trade Unions - Interim Relief - Remedies - Trusteeship - Unfair Labour Practice - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

WESTBURY HOWARD JOHNSON HOTEL ["THE WESTBURY"], AND H.E.R.E. ["THE PARENT UNION"]; RE H.E.R.E., LOCAL 75 ["LOCAL 75"] 1166

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ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE SAMUEL OFOSU ANSAH; RE USWA..... 1057

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Related Employer - Change in Working Conditions - Interim Relief - Remedies - Unfair Labour	

Practice - Board making interim order directing employer to rescind or suspend operation of new arrangements affecting employees pending determination of union's complaint or expiration of "freeze", whichever first occurs

CHECKER LIMOUSINE AND AIRPORT SERVICE, G. HANLON HOLDINGS INC., G.J. HANLON ("HANLON") AND J. ORENDORFF, 947465 ONTARIO LTD., C.O.B. AS; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCALS 414, 422, 440, 448, 461, 483, 488, 1000 AND 1688 991

Related Employer - Construction Industry - Board finding that statutory preconditions established by section 1(4) of the Act met - Fact that only a portion of related employer's work would potentially fall under ICI agreement not a factor causing Board to exercise discretion against making single employer declaration - Board unable to determine, based on evidence and argument before it, whether ICI agreement applying to work performed in related employer's shop - Board applying *Metroland Printing* case - Board issuing related employer declaration in order to preserve applicant union's ability to claim work and ensure that, if disputed, the issue will be dealt with by Board of Arbitration

DUFFY MECHANICAL CONTRACTORS LIMITED, DURASYSTEMS BARRIERS INC.; RE SMW, LOCAL 30..... 992

Remedies - Bargaining Unit - Combination of Bargaining Units - Practice and Procedure - Board in earlier decision combining full-time and part-time units and remaining seized to deal with further relief - Union subsequently asking Board to set matter down for hearing with respect to remedial relief - Before listing matter for hearing, Board directing union to provide it and employer with detailed description of orders or remedies requested and detailed statement of all material facts on which it relies in accordance with Rule 12 - Employer directed to reply within seven days and to supply information required by Rule 14

MARRIOTT CORPORATION (AT CARLETON UNIVERSITY); RE CUPE AND ITS LOCAL 2451..... 1016

Remedies - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Employer violating Act in threatening and intimidating one employee with respect to union membership and in laying off second employee because of his union activity - Reinstatement with compensation ordered - Board determining that as result of employer's violations true wishes of employees unlikely to be ascertained - Union certified under section 9.2 of the Act

BASILE INTERIORS LTD.; RE PAT, LOCAL 1494..... 963

Remedies - Certification - Certification Where Act Contravened - Interference with Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Employer found to have violated Act by certain statements contained in bulletins distributed to employees, certain statements made by employer at meeting with employees, and by certain statements made to two employees about soliciting support for the union - Board directing employer to post and distribute Board notice to employees, to permit union access to plant during working hours for purpose of convening meeting with employees out of presence of members of management, and to rescind written warnings given to two employees - Board declining to certify union under section 9.2 of the Act - Representation vote directed

CANAC KITCHENS LIMITED; RE CJA 972

Remedies - Change in Working Conditions - Interim Relief - Related Employer - Unfair Labour Practice - Board making interim order directing employer to rescind or suspend operation

of new arrangements affecting employees pending determination of union's complaint or expiration of "freeze", whichever first occurs

CHECKER LIMOUSINE AND AIRPORT SERVICE, G. HANLON HOLDINGS INC., G.J. HANLON ("HANLON") AND J. ORENDORFF, 947465 ONTARIO LTD., C.O.B. AS; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCALS 414, 422, 440, 448, 461, 483, 488, 1000 AND 1688 991

Remedies - Change in Working Conditions - Interim Relief - Unfair Labour Practice - Union alleging that change in benefit plan and change in method of wage payment to particular classification improperly motivated and violating statutory freeze - Union's application for interim relief dismissed on grounds of delay

THE BRICK WAREHOUSE CORPORATION; RE SEU LOCAL 268, AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C. 1116

Remedies - Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Unfair Labour Practice - Board discussing importance of filing full and complete declarations in applications for interim relief - Board directing that two of three discharged employees be reinstated pending determination of unfair labour practice complaint - Board determining that balance of harm weighing in employer's favour in respect of third discharged employee

SHIRLON PLASTICS INC.; RE UFCW, AFL/CIO, CLC 1086

Remedies - Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Trusteeship - Unfair Labour Practice - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

WESTBURY HOWARD JOHNSON HOTEL ["THE WESTBURY"], AND H.E.R.E. ["THE PARENT UNION"]; RE H.E.R.E., LOCAL 75 ["LOCAL 75"] 1166

Remedies - Interim Relief - Picketing - Employer making application under section 11.1 of the Act for restrictions with respect to picketing - Employer seeking interim order restricting the picketing pending determination of its section 11.1 application - Balance of harm weighing against making interim order sought - Application for interim relief dismissed

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE UFCW, LOCALS 175 AND 633 AND SHELLY FAIR SERVICE, SCOTT CONSTABLE, PEGGY SWIFT AND GARY DIMOCK 1119

Sale of a Business - Bargaining Rights - Bargaining Unit - St. Joseph's Hospital transferring laboratory services to Brantford General Hospital - Hospitals acknowledging that transfer constituting "sale of a business" - Board finding intermingling of employees and determining that unit of all paramedical employees (and not only those employed in "stat" laboratory) constituting appropriate bargaining unit - Transferred employees representing less than 5 percent of all paramedical employees of Brantford General Hospital - Board declining to direct taking of representation vote - Board declaring that union no longer the bargaining agent for any Brantford General Hospital laboratory employees

THE BRANTFORD GENERAL HOSPITAL, ST. JOSEPH'S HOSPITAL, BRANTFORD AND; RE OPSEU 1103

School Boards and Teachers Collective Negotiations Act - Charter of Rights and Freedoms - Constitutional Law - Duty of Fair Representation - Unfair Labour Practice - Board rejecting submission that section 2(1)(f) of the <i>Labour Relations Act</i> violating section 7 of the Charter by depriving teachers of the right to bring complaints of unfair representation against their bargaining agent - Board without jurisdiction to deal with application - Application dismissed	
GRANT TADMAN; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION TORONTO SECONDARY UNIT; RE METROPOLITAN SEPARATE SCHOOL BOARD	1096
Settlement - Ratification and Strike Vote - Reconsideration - Strike - Strike Replacement Workers - Unfair Labour Practice - Employer seeking reconsideration of Board decision finding that employer unlawfully using strike replacement workers - Board not permitting employer to resile from its earlier agreement with union that conditions in subsections 73.1(2) and (3) had been met - Reconsideration application dismissed	
MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229	1018
Strike - Ratification and Strike Vote - Reconsideration - Settlement - Strike Replacement Workers - Unfair Labour Practice - Employer seeking reconsideration of Board decision finding that employer unlawfully using strike replacement workers - Board not permitting employer to resile from its earlier agreement with union that conditions in subsections 73.1(2) and (3) had been met - Reconsideration application dismissed	
MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229	1018
Strike - Ratification and Strike Votes - Reconsideration - Strike Replacement Workers - Unfair Labour Practice - Union making application in respect of alleged unlawful use replacement workers during strike - Issue arising as to whether section 73.1 of the Act applying - Board not satisfied that strike vote conducted by union in accordance with section 74(4) to (6) - Unfair labour practice complaint and reconsideration application dismissed	
TOROMONT INDUSTRIES LTD., TOROMONT, A DIVISION OF; RE THE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 112	1149
Strike Replacement Workers - Ratification and Strike Votes - Reconsideration - Strike - Unfair Labour Practice - Union making application in respect of alleged unlawful use replacement workers during strike - Issue arising as to whether section 73.1 of the Act applying - Board not satisfied that strike vote conducted by union in accordance with section 74(4) to (6) - Unfair labour practice complaint and reconsideration application dismissed	
TOROMONT INDUSTRIES LTD., TOROMONT, A DIVISION OF; RE THE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 112	1149
Strike Replacement Workers - Ratification and Strike Vote - Reconsideration - Settlement - Strike - Unfair Labour Practice - Employer seeking reconsideration of Board decision finding that employer unlawfully using strike replacement workers - Board not permitting employer to resile from its earlier agreement with union that conditions in subsections 73.1(2) and (3) had been met - Reconsideration application dismissed	
MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229	1018
Timeliness - Certification - Collective Agreement - Pre-Hearing Vote - Trade Union Status - Staff Association wishing to displace CUPE as bargaining agent for employees of Board of Education - Staff Association found to be trade union within meaning of <i>Labour Relations Act</i> -	

Board concluding that extension of collective agreement to March 31, 1996 pursuant to section 35 of *Social Contract Act* making staff association's certification application untimely

OTTAWA BOARD OF EDUCATION; RE CUPE AND ITS LOCAL 1400; RE EDUCATION SUPPORT STAFF ASSOCIATION 1024

Trade Union - Trade Union Status - Union Successor Status - OSSTF applying for declaration that it is successor union to Association of Schedule II Employees - Board concluding that fact that Association's constitution permits admission of non-employees and that it in fact does so would not in itself prevent Association from being considered a trade union within meaning of the Act - Parties directed to meet for pre-hearing conference

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO; RE THE OSSTF 1098

Trade Union Status - Certification - Collective Agreement - Pre-Hearing Vote - Timeliness - Staff Association wishing to displace CUPE as bargaining agent for employees of Board of Education - Staff Association found to be trade union within meaning of *Labour Relations Act* - Board concluding that extension of collective agreement to March 31, 1996 pursuant to section 35 of *Social Contract Act* making staff association's certification application untimely

OTTAWA BOARD OF EDUCATION; RE CUPE AND ITS LOCAL 1400; RE EDUCATION SUPPORT STAFF ASSOCIATION 1024

Trade Union Status - Trade Union - Union Successor Status - OSSTF applying for declaration that it is successor union to Association of Schedule II Employees - Board concluding that fact that Association's constitution permits admission of non-employees and that it in fact does so would not in itself prevent Association from being considered a trade union within meaning of the Act - Parties directed to meet for pre-hearing conference

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO; RE THE OSSTF 1098

Trusteeship - Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Unfair Labour Practice - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

WESTBURY HOWARD JOHNSON HOTEL ["THE WESTBURY"], AND H.E.R.E. ["THE PARENT UNION"]; RE H.E.R.E., LOCAL 75 ["LOCAL 75"] 1166

Unfair Labour Practice - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Remedies - Employer violating Act in threatening and intimidating one employee with respect to union membership and in laying off second employee because of his union activity - Reinstatement with compensation ordered - Board determining that as result of employer's violations true wishes of employees unlikely to be ascertained - Union certified under section 9.2 of the Act

BASILE INTERIORS LTD.; RE PAT, LOCAL 1494 963

Unfair Labour Practice - Certification - Certification Where Act Contravened - Interference with Trade Unions - Intimidation and Coercion - Remedies - Employer found to have violated Act by certain statements contained in bulletins distributed to employees, certain statements made by employer at meeting with employees, and by certain statements made to two employees about soliciting support for the union - Board directing employer to post and distribute Board notice to employees, to permit union access to plant during working

hours for purpose of convening meeting with employees out of presence of members of management, and to rescind written warnings given to two employees - Board declining to certify union under section 9.2 of the Act - Representation vote directed

CANAC KITCHENS LIMITED; RE CJA 972

Unfair Labour Practice - Certification - Certification Where Act Contravened - Change in Working Conditions - Discharge - Discharge for Union Activity - Interference in Trade Unions - Board finding that company did not violate Act in discharging union supporter or three managers, and that a number of other allegations not established - Employer violating Act in telling employee that he could not solicit for union on company property, promising to clear discipline records, removing last names from work schedules and time cards and offering Christmas bonus to employees as inducement to avoid dealing with union and thus interfering with union's organizing drive - Board inviting submissions on whether it ought to determine application under "old" section 8 of the Act before hearing adjourned unfair labour practice complaint - Board remaining seized as to all remedial matters

PRICE CLUB WESTMINSTER; PRICE CLUB ST. LAURENT INC. C.O.B. AS; RE UFCW, LOCAL 175 1029

Unfair Labour Practice - Change in Working Conditions - Interim Relief - Remedies - Union alleging that change in benefit plan and change in method of wage payment to particular classification improperly motivated and violating statutory freeze - Union's application for interim relief dismissed on grounds of delay

THE BRICK WAREHOUSE CORPORATION; RE SEU LOCAL 268, AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C. 1116

Unfair Labour Practice - Change in Working Conditions - Interim Relief - Related Employer - Remedies - Board making interim order directing employer to rescind or suspend operation of new arrangements affecting employees pending determination of union's complaint or expiration of "freeze", whichever first occurs

CHECKER LIMOUSINE AND AIRPORT SERVICE, G. HANLON HOLDINGS INC., G.J. HANLON ("HANLON") AND J. ORENDORFF, 947465 ONTARIO LTD., C.O.B. AS; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCALS 414, 422, 440, 448, 461, 483, 488, 1000 AND 1688 991

Unfair Labour Practice - Charter of Rights and Freedoms - Constitutional Law - Duty of Fair Representation - School Boards and Teachers Collective Negotiations Act - Board rejecting submission that section 2(1)(f) of the *Labour Relations Act* violating section 7 of the Charter by depriving teachers of the right to bring complaints of unfair representation against their bargaining agent - Board without jurisdiction to deal with application - Application dismissed

GRANT TADMAN; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION TORONTO SECONDARY UNIT; RE METROPOLITAN SEPARATE SCHOOL BOARD 1096

Unfair Labour Practice - Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Remedies - Board discussing importance of filing full and complete declarations in applications for interim relief - Board directing that two of three discharged employees be reinstated pending determination of unfair labour practice complaint - Board determining that balance of harm weighing in employer's favour in respect of third discharged employee

SHIRLON PLASTICS INC.; RE UFCW, AFL/CIO, CLC 1086

Unfair Labour Practice - Discharge - Duty of Fair Representation - Employee complaining about

union's failure to advance his grievance to arbitration - Board noting that employee's complaint premature and that fact that a grievance does not go to arbitration does not, in itself, establish any arguable breach of the Act - Board exercising its discretion not to inquire into complaint - Complaint dismissed

GEORGE LEE; RE LOCAL 75, UNION REPRESENTATIVE CLEDWYN LONGE 1009

Unfair Labour Practice - Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Trusteeship - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

WESTBURY HOWARD JOHNSON HOTEL ["THE WESTBURY"], AND H.E.R.E. ["THE PARENT UNION"]; RE H.E.R.E., LOCAL 75 ["LOCAL 75"] 1166

Unfair Labour Practice - Ratification and Strike Vote - Reconsideration - Settlement - Strike - Strike Replacement Workers - Employer seeking reconsideration of Board decision finding that employer unlawfully using strike replacement workers - Board not permitting employer to resile from its earlier agreement with union that conditions in subsections 73.1(2) and (3) had been met - Reconsideration application dismissed

MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229 1018

Unfair Labour Practice - Ratification and Strike Votes - Reconsideration - Strike - Strike Replacement Workers - Union making application in respect of alleged unlawful use replacement workers during strike - Issue arising as to whether section 73.1 of the Act applying - Board not satisfied that strike vote conducted by union in accordance with section 74(4) to (6) - Unfair labour practice complaint and reconsideration application dismissed

TOROMONT INDUSTRIES LTD., TOROMONT, A DIVISION OF; RE THE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 112 1149

Union Successor Status - Evidence - Practice and Procedure - Reconsideration - Objecting employees seeking reconsideration of Board's decision declaring Steelworkers' to be successor union to RWDSU on grounds that the employer had posted no notice of the proceeding in the workplace - At conclusion of objecting employees' case, employer making motion for early dismissal of the reconsideration application - Board reviewing jurisprudence and policy considerations associated with procedures for facilitating swift, balanced hearings which combine expedition and full opportunity to be heard - Board not requiring employer or Steelworkers' to make election as to whether to call evidence or not, but dismissing employer's motion

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE RWDSU, AFL-CIO-CLC AND ITS LOCAL AFFILIATES RWDSU AFL-CIO-CLC, LOCAL 414, 429, 545, 579, 582, 915 AND 991; RE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA, LOCAL 414 1127

Union Successor Status - Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Trusteeship - Unfair Labour Practice - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing

employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

WESTBURY HOWARD JOHNSON HOTEL ["THE WESTBURY"], AND H.E.R.E. ["THE PARENT UNION"]; RE H.E.R.E., LOCAL 75 ["LOCAL 75"].....

1166

Union Successor Status - Trade Union - Trade Union Status - OSSTF applying for declaration that it is successor union to Association of Schedule II Employees - Board concluding that fact that Association's constitution permits admission of non-employees and that it in fact does so would not in itself prevent Association from being considered a trade union within meaning of the Act - Parties directed to meet for pre-hearing conference

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO; RE THE OSSTF.....

1098

2873-92-G International Union of Operating Engineers, Local 793, Applicant v. Associated Contracting Inc., Responding Party

Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Road building contractor entering into voluntary recognition agreement with union in August 1990 - Employer applying collective agreement until September 1991 when it returned to operating as non-union contractor - Union grieving non-compliance with agreement in November 1992 - Board rejecting employer's submission that grievance not arbitrable on basis that union had abandoned bargaining rights

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *S.B.D. Wahl* and *M. Gallagher* for the applicant; *W. Thornton* and *T. Capobianco* for the responding party.

DECISION OF THE BOARD; August 5, 1994

1. This is a referral of a grievance to the Board pursuant to section 126 of the *Labour Relations Act* (the "Act"). The grievance alleges a number of violations of a collective agreement between the responding party (also referred to as the "Employer" or "Contracting") and the applicant (also referred to as the "Union" or "Local 793"). Prior to the hearing the Employer raised a preliminary issue as to the arbitrability of the grievance on the basis that Local 793 had abandoned its collective agreement/bargaining rights. Hearings into this preliminary issue were held on March 9, 10 and 11 and June 6 and 7, 1994.

2. Contracting agreed to voluntarily recognize Local 793 by entering into a collective agreement on August 30, 1990. Contracting applied the collective agreement until on or about September 1, 1991 at which time it returned to operating as a non-union contractor. The present grievance was filed on November 12, 1992.

Issue

3. The issue for determination is whether, during the period from September 1, 1991 to November 12, 1992, Local 793 abandoned its bargaining rights.

4. It is Contracting's position that, given the events which transpired before the parties entered into a collective agreement and those that occurred within the following year, it is reasonable to infer an intention on Local 793's part to abandon its bargaining rights. Contracting submits that Local 793 was aware that Contracting had ceased to apply the collective agreement in September, 1991 and took no steps, until the filing of the instant grievance, to assert its bargaining rights. Contracting argues that Local 793's conduct from September, 1991 to November, 1992 is entirely consistent with an intention to abandon its bargaining rights and inconsistent with a belief on its part that it retained such rights.

5. It is Local 793's position that it has not abandoned its bargaining rights. Local 793 asserts that it was unaware that Contracting was operating within the geographic scope of its collective agreement from September, 1991 to mid-October, 1992 and was thus unaware that its agreement was not being applied. Local 793 submits that it has acted throughout in a manner designed to pursue and protect its bargaining rights and disputes Contracting's characterization of the evidence to the contrary.

Law

6. Whether or not a union has abandoned its bargaining rights is a question of fact to be resolved by the Board in the circumstances of each case (see *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523). The factors considered by the Board in making a determination are summarized in *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110 at page 111 as follows:

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

7. In the context of the construction industry the Board has accepted that a union is not expected to actively pursue its bargaining rights where there is an absence of employees who would be covered by the collective agreement (see *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568 at page 572).

Findings of Fact

8. Discrepancies exist between the evidence given by Tony Capobianco, the witness called on behalf of Contracting, and the evidence given by Mike Gallagher and Vito Montagnese, the witnesses called on behalf of the Union. These discrepancies primarily relate to the contents of various conversations. The Board has considered the credibility of the witnesses according to the usual criteria, including their ability to resist the tug of self-interest in giving their testimony, their demeanour and what is reasonably probable in the circumstances. In many instances, the Board accepts the evidence of Capobianco over the evidence of Gallagher. Gallagher gave evidence in a number of respects which favoured the Union's theory of this case and which were proven through cross-examination to be inaccurate. It was apparent that Gallagher's testimony was influenced by the tug of self-interest. Where a conflict exists between the evidence of Capobianco and Montagnese, the Board has resolved the discrepancy on the basis of what is most probable in the circumstances. In a few instances the Board has rejected uncontradicted evidence of Capobianco and Gallagher. It has done so on the basis that the evidence, though uncontradicted, is nevertheless inherently improbable in the circumstances and not sufficiently credible.

9. There is little dispute with respect to the events which occurred prior to and following the filing of this grievance. The primary dispute between the parties relates, not so much to the "facts" of the case, but rather what inferences the Board should draw from the facts.

10. Tony Capobianco's father, Anthony Capobianco, operates a road building company by the name of Associated Paving Company Ltd. ("Paving"). In 1988 four additional, separate companies, each owned by one of Anthony Capobianco's children, were incorporated: Rosalucia Landscaping Inc. ("Landscaping"), owned by Rosalucia Capobianco, to engage in landscaping and snowplowing; Contracting, owned by Tony Capobianco, to engage in concrete works; The Core Group Inc. ("Core Group"), owned by Stanley Capobianco, to engage in excavation works; and Capo Contracting Inc. ("Capo"), owned by Leo Capobianco, to engage in asphalt paving works. A fifth, pre-existing company, Capobianco Management Ltd. (the "management company"), owned by Maria Capobianco, operated as a management company for the Capobianco family companies.

11. In 1988 an oral subcontracting agreement was entered into amongst Paving, Landscaping, Contracting, Core Group and Capo (the "subcontracting companies"). Pursuant to this agree-

ment Paving bid on work, obtained contracts and was responsible for all required bonding. Once obtained, work would be subcontracted to the appropriate subcontracting company. Paving would retain a percentage of the contract price as its profit. The subcontracting arrangement made it possible for the subcontracting companies to utilize Paving's long standing reputation in the road building business. The management company would provide bookkeeping and payroll services to Paving and the subcontracting companies and receive a percentage of each contract for doing so. At this time none of the Capobianco family companies had collective bargaining relations with any trade union. From the time it began operations until it entered into contractual relations with Local 793, Contracting obtained all of its work from Paving.

12. In 1990 Contracting was engaged on a job for Fermar Paving ("Fermar"). Fermar was bound to a collective agreement with Local 183 of the Labourers International Union of North America (the "Labourers" or "Local 183"). As is typical in the construction industry, Fermar's agreement with Local 183 required Fermar to subcontract work only to companies also in contractual relations with Local 183. Local 183 approached Fermar and insisted that Contracting be removed from the job. Tony Capobianco approached Local 183 and enquired about signing a voluntary recognition agreement. Local 183 indicated that it would only enter into a voluntary recognition agreement if all of the Capobianco family companies were willing to sign. The remaining Capobianco family companies were not interested in executing a voluntary recognition agreement with Local 183 and accordingly Contracting was required to leave the Fermar job site.

13. Following the removal of Contracting from the Fermar job site, Contracting commenced work on a project at Eglinton and Plaza View (the "Kaneff Project") for Kaneff Properties Limited ("Kaneff"). The contract for this job was initially between Paving and Kaneff; however, at some point prior to August 31, 1990, this contract was ripped up and replaced with a contract between Contracting and Kaneff. Kaneff is bound to a collective agreement with Local 793 which contains the typical subcontracting clause. Local 793 approached Kaneff and indicated that there was a problem because there was a non-union contractor on the job site. Kaneff's Project Manager brought the problem to the attention of Tony Capobianco, who indicated that Contracting would be prepared to sign a collective agreement with Local 793. A meeting was set up between the Kaneff representative, representatives of Local 793 and Capobianco.

14. The meeting took place at Kaneff's offices on August 31, 1990. Mike Gallagher and Vito Montagnese attended the meeting on behalf of Local 793. A representative of Kaneff attended the first portion of the meeting. Tony Capobianco attended the meeting on behalf of Contracting. Local 793 was surprised that Tony Capobianco represented Contracting at the meeting. All of the equipment on the site (the only visible sign indicating the identity of the contractor) bore the "Associated Paving" name. Thus, Local 793 was under the impression that it was Paving doing the work. The contract between Kaneff and Contracting was produced to reassure Local 793 that Contracting in fact held the contract with Kaneff. Local 793 was not informed that the contract had initially been held by Paving.

15. Gallagher and Montagnese were informed by Capobianco that Contracting was the general contractor on the project and had subcontracted work to Paving. Capobianco indicated that Contracting was a general road building contractor. Contracting did not have equipment to do asphalt work but had equipment to do site preparation work connected to road building construction and concrete work, specifically curbs and sidewalks. Gallagher was left with the impression that Capobianco was attempting to set up a company separate from his father's, he was hoping to get work on union job sites and he wanted to do things differently than his father.

16. Approximately an hour and a half was spent going over the contents of the Independent

Roadbuilders Collective Agreement. The subcontracting clause was pointed out to Capobianco and it was explained to him that this clause meant that Contracting could not subcontract work to Paving in the future. Capobianco enquired as to how he was to finish the Kaneff job as he had Paving's equipment working on site. Montagnese indicated that, because Contracting was going to be signing a voluntary recognition agreement and would be operating union in the future, Contracting would be permitted to finish the Kaneff job using Paving; however, in the future, all subcontractors must be in contractual relations with Local 793. At the end of this meeting Tony Capobianco signed a collective agreement with Local 793 on behalf of Contracting.

17. Following the meeting Gallagher made arrangements to sign up some of the operating engineers on the job site, following which they began working for Contracting but continued to operate equipment that bore the name "Associated Paving". One of the operators signed up by Gallagher was the curb machine operator by the name of Tom Rennick.

18. Capobianco then advised the Labourers that Contracting had entered into a collective agreement with Local 793. The Labourers agreed to sign a voluntary recognition agreement with Contracting.

19. Following the signing of collective agreements with the Labourers and Local 793, Contracting implemented a number of changes. Although Contracting continued to do work under the subcontracting arrangement it had with Paving, it also obtained work on its own. In addition, due to the deductions required under the collective agreements, a separate system was set up to handle Contracting's payroll. Prior to entering into the collective agreements Contracting's employees received cheques with the name "Capobianco Management Ltd." on them; after entering into the collective agreements, employees received cheques with the name "Associated Contracting Inc." on them.

20. Contracting applied the collective agreements for the balance of the 1990 road building season. Contracting did not operate from December, 1990 to approximately April, 1991. Contracting applied the collective agreements during the 1991 road building season until the end of August. Contracting employed approximately three or four equipment operators during this period of time.

21. In December, 1990, the Labourers filed a related employer application naming all of the Capobianco family companies as responding parties. Hearings were held from December, 1990 to August, 1991. The hearings were brought to an end when it was agreed that the Labourers would rip up its collective agreement with Contracting and Contracting would revert to being non-union. The Labourers agreed to this resolution because it had become apparent that it could not win the related employer application and having bargaining rights with respect to only one of the Capobianco family companies was unworkable. Local 793 was interested in the outcome of the Labourers' related employer application. Gallagher informed himself as to how the case was resolved.

22. Following resolution of the Labourers' related employer application, Contracting immediately stopped applying the Local 793 collective agreement. No further remittances or dues deductions were made. All of Contracting's employees were returned to the Capobianco Management Ltd. payroll such that their cheques henceforth bore the name "Capobianco Management Ltd." and not "Associated Contracting Inc.". One of the operating engineers, Tom Rennick, worked for a few days following Contracting's reversion to non-union status and then quit. Union dues were not deducted from Rennick's final pay cheque, he was not paid the hourly wage rate stipulated in the agreement and this cheque bore the name "Capobianco Management Ltd.".

23. Rennick subsequently contacted Gallagher to complain about his wage rate and over-

time pay while employed by Contracting. Rennick met with Gallagher on September 13, 1991 and showed Gallagher his final pay cheque with stub attached. Gallagher made a copy of the cheque and stub. Gallagher noticed that Rennick had not received the proper hourly wage for his last week of work and union dues had not been deducted. Gallagher noticed the company's name on the cheque but did not attach any significance to it. Rennick advised Gallagher he had quit because he was tired of being "jerked around" with respect to his wage rate. Gallagher did not question Rennick's decision to quit as he was aware Rennick was moving to Ottawa. Rennick did not advise Gallagher that Contracting was operating non-union.

24. On October 9, 1991 Gallagher completed a grievance form on Rennick's behalf. Gallagher then contacted Capobianco to set up a meeting at the Union's offices to discuss the matter. Rennick's hours for every pay period, beginning with the pay period ending May 4 through to the pay period beginning August 17, were reviewed and a settlement figure was arrived at. Rennick's last two and possibly three pay periods are not covered by the settlement.

25. Following agreement on a settlement figure, Gallagher indicated that he would have to obtain Rennick's approval. Rennick's approval was obtained. Gallagher contacted Capobianco to make arrangements to get the settlement cheque. Gallagher and Capobianco met and Gallagher was given a cheque. The cheque bore the name "Associated Contracting Inc.". Gallagher noticed the different name on the cheque but, once again, did not attach any significance to it. Gallagher mailed the cheque to Rennick. Shortly thereafter Gallagher received a call from Rennick who indicated that the cheque had not been signed. The cheque was returned to Gallagher who set up a further meeting with Capobianco to have the cheque signed. Gallagher and Capobianco met again and Capobianco signed the cheque.

26. At no time during the course of any of the conversations which took place in connection with the Rennick grievance did Capobianco indicate that he was working non-union or did Gallagher state that Local 793's agreement remained in effect. During one of these meetings Capobianco indicated that work was slow.

27. On November 7, 1991 the Delinquency Control Officer of Local 793 sent Contracting a letter indicating that contributions for union dues and other benefits for the work month of September, 1991 had not been received ("the delinquency notice"). The letter further states "if you had no employees during this period, you are required to file a 'Nil' report...". This letter was automatically generated by the Delinquency Control Officer when remittances were not received from Contracting. Gallagher did not see this letter until the fall of 1992.

28. On November 15, 1991 Capobianco wrote to the Delinquency Control Officer as follows:

"We would like to confirm that there will be no Remittance for the month of September, October and November as there are no employees."

Capobianco did not contact Gallagher or anyone from the Union to enquire as to why he had received the delinquency notice when he was no longer applying the collective agreement. Capobianco testified that he did not make enquiries as he was "sensitive" about the situation.

29. Gallagher did not see or become aware of Capobianco's letter of November 5, 1991 until the fall of 1992. Gallagher was aware that Contracting was delinquent in October, 1991 as its name was on a delinquency list he receives each month. Contracting's name did not appear on the delinquency list for December, 1991 and January, 1992.

30. On February 6, 1992, the labour relations department of Local 793 sent Contracting a letter expressing its desire to amend the existing collective agreement ("notice to bargain"). Gallagher had no personal involvement in this letter being sent out. It was automatically generated by the Union's computer and sent as part of a general mailing.

31. After receiving the notice to bargain Capobianco telephoned Gallagher. Capobianco told Gallagher that he had received the letter and wanted to get together to discuss it. Gallagher indicated that he was going on vacation and would contact Capobianco when he returned. Capobianco testified that he did not indicate to Gallagher that Contracting was non-union because he was "sensitive" about it.

32. On August 12, 1992, Local 793 sent a letter to all of the Metropolitan Toronto Independent Roadbuilders advising them of the major changes to the MTRBA collective agreement and instructing them to implement the changes immediately. The letter indicates that a representative of Local 793 would contact them shortly "in regards to the signing of a new Collective Agreement". This letter was mailed to Contracting. Contracting did not receive the letter.

33. During the 1992 road building season all of Contracting's large projects were outside of Board Area 8. Contracting performed a number of small jobs within Board Area 8 for the City of Mississauga, the City of Etobicoke and private commercial malls, factories and shopping malls. In all cases the tender for the work was put in by Paving, the contract was awarded to Paving, all equipment on the site bore the name "Associated Paving" or no name at all, any signs on the job site said "Associated Paving", and any notices published in the Daily Commercial News indicated that Paving was awarded the contract. Capobianco did not see anyone from Local 793 on any of these job sites until October, 1992.

34. In May, 1992 Contracting and Paving returned to the Kaneff Project (the same site that Contracting was working on when it signed the voluntary recognition agreement with Local 793 in August, 1990) to finish the job. A Kaneff representative was approached by Local 793 concerning the fact that work was being done on the site non-union. Kaneff requested that Capobianco straighten the matter out. Capobianco contacted Montagnese and explained to him that there was only a few days of work left. The vast majority of the work being performed was asphalt work. Montagnese advised him that he would allow the work to be finished but no other work was to be done.

35. Montagnese agreed to let Paving finish the job because, when the collective agreement was first entered into, he had agreed that Contracting could complete the job using Paving.

36. In October, 1992, Contracting was working on a job site in Board Area 26 doing concrete work for Memme Construction ("Memme"). Gallagher was told by a representative of Memme and an inspector on site that the subcontractor on site was Paving. On the two occasions Gallagher visited the job site no one was working but he could see signs of road work being done. Gallagher and Montagnese were shown a contract by Memme naming Paving as the subcontractor. After seeing this contract Memme was advised that Local 793 did not have an agreement with Paving and that Memme was therefore in violation of the subcontracting clause in its agreement. Memme was asked to move Paving off the project. Capobianco was advised by the site superintendent that he would have to leave the job site because of a grievance filed by Local 793.

37. In mid-October, 1992, Gallagher witnessed Contracting working on two separate road repair contracts for the City of Mississauga. Gallagher recognized these two projects as being performed by Contracting because Gallagher saw Capobianco and one of the operating engineers he

had signed up in August, 1990 working on the site. Gallagher noticed that work was being performed by an operating engineer who was not a member of Local 793.

38. On October 30, 1992 Local 793 filed a Request for the Appointment of a Conciliation Officer (the "request"). Gallagher specifically instructed the Union's Labour Relations Department secretary to file the request.

39. On November 5, 1992 the Union filed an Application for Certification naming all of the Capobianco family companies including "Associated Contracting Inc." as responding parties. In the title of proceedings "and/or" appears between each company name. In paragraph 10 of the application under the heading "[o]ther relevant statements" the following appears:

(i) The Applicant, if necessary, relies upon the provisions of Sections 64 and 1(4) of the *Labour Relations Act* R.S.O. 1990 c. L-2 as amended.

...

(x) Contracting and the Applicant were bound by a collective agreement which expired on April 30, 1992. Contracting has ceased to observe the provisions of this collective agreement.

40. At a meeting with a Labour Relations Officer the parties attempted to agree on the identity of the employees for the purposes of the count. The parties worked from the Schedule "A" to the responding parties' response. Only Contracting and Capo were active at the time of the application. The Schedule "A" lists the employees of Contracting under the heading "Associated Contracting Inc." and the employees of Capo under the heading "Capo Contracting Inc.". There are two employees listed as having been employed by Contracting on the application date. Neither individual was challenged by the Union.

41. Numerous days of Labour Relations Officer examinations have been held in connection with this application for certification and the matter was heard by a panel of the Board, differently constituted, on June 14, 15 and 16, 1994.

42. On November 10, 1992 Contracting's counsel wrote to the Assistant Deputy Minister of Labour objecting to the appointment of a conciliation officer on the basis that Local 793 had abandoned its bargaining rights. This letter indicates that, since April 30, 1992, "the Employer has openly performed a number of projects involving work falling within the recognition provisions of the expired collective agreement."

43. On November 12, 1992 the instant grievance was filed.

Submissions on Behalf of Contracting

44. As indicated earlier, it is argued on behalf of Contracting that a number of inferences should be drawn from the facts and that the facts, combined with such inferences, lead to the conclusion that Local 793 voluntarily abandoned its bargaining rights with Contracting. Without intending to canvass all aspects of the argument advanced on behalf of Contracting, set out below is brief summary of its submissions.

45. Proceeding chronologically, Contracting points to the fact that the Labourers abandoned its collective agreement with Contracting in August, 1991 when it became apparent that its related employer application would not succeed. Gallagher was interested in these proceedings and informed himself of their outcome. Contracting argues that it is reasonable to infer that Local 793 would also abandon its bargaining rights at this time.

46. On or about September 1, 1991, following the Labourers' abandonment of its bargaining rights, Contracting ceased applying the Local 793 collective agreement. On September 13, 1991, Rennick provided Gallagher with a copy of his final pay cheque which indicated that Rennick was not paid the hourly wage rate stipulated in the agreement and that union dues had not been deducted. Further, when Gallagher was given the settlement cheque, he was in possession of one cheque which bore the name "Associated Contracting" and one which bore the name "Capobianco Management". On this basis, Contracting argues that Gallagher was aware, in September, 1991, that Contracting was not applying the collective agreement. Gallagher's failure to do anything to ensure that the agreement was applied indicates an intention on Local 793's part to abandon its collective agreement.

47. Contracting points to the *terms* on which the Rennick grievance was settled as further evidence in support of abandonment. The settlement figure negotiated by Local 793 did not include compensation for lost wages or unpaid union dues for the first week in September. Contracting submits that the Board should infer from the failure to claim damages for this week that the Union was accepting that the agreement was no longer in force.

48. Contracting argues that the Board should not construe the Union's letters of November 7, 1991 and February 6, 1992, the delinquency notice and notice to bargain respectively, as efforts on the Union's part to pursue its bargaining rights as they were automatically generated and no thought went into sending them out. It is argued that Capobianco's letter of November 15, 1991 is simply a response to the wording of the Union's November 7 letter or, alternatively, irrelevant because Gallagher did not see the letter until the fall of 1992.

49. It is argued that Contracting was active throughout the 1992 road building season and did not apply the collective agreement. Contracting submits that Local 793 knew it was active and did nothing to preserve its bargaining rights. Alternatively, Contracting argues that Local 793 is required to exercise due diligence in monitoring the activities of contractors with whom it has contractual relations and, in the present case, failed to do so.

50. Contracting argues that Local 793 took steps to have Contracting removed from the Kaneff job site in May, 1992 and the Memme job site in October, 1992. The Board should infer from these two incidents that Local 793 believed Contracting to be a non-union contractor. Even if Local 793 believed the contractor on these two sites to be Paving and not Contracting, Local 793, it is submitted, believed Contracting and Paving to be related employers such that, if Local 793 believed Contracting was a union contractor, it would have viewed Paving as a union contractor as well. Local 793's actions are not consistent with such a view.

51. Contracting argues that the filing of the application for certification is completely inconsistent with an assertion on Local 793's part that it already has bargaining rights with respect to Contracting. Contracting points to the list of employees prepared for the purposes of the count which lists individuals employed by Contracting as confirmation that Local 793 is applying to represent those it now claims it already represents. The Board should conclude that, as of the filing of the application for certification, Local 793 did not believe it had bargaining rights with respect to Contracting. The only way it could have lost such rights is through abandonment.

52. A Request for the Appointment of a Conciliation Officer was made on October 30, 1992. Various letters were exchanged between counsel and the Ministry of Labour until December 1992. On May 6, 1993 the Minister of Labour advised the parties that a Conciliation Officer would be appointed. Local 793 did nothing between December 1992 and May 1993 to pursue the request. Contracting submits that it should be inferred from Local 793's inaction that it did not believe that

it had bargaining rights. Had Local 793 believed it retained such rights it would have been much more vigilant in following up on its request.

Decision

53. Having considered all of the documentary and oral evidence before us it is our conclusion that Local 793 has not abandoned its bargaining rights. For reasons set out below, we have concluded that no inference should be drawn from the Labourers' abandonment of its bargaining rights in August, 1991. We do not infer from the facts that Local 793 was aware that Contracting ceased to apply the collective agreement in September, 1991 or that it acquiesced in the non-application of the agreement. It is our finding that Local 793 was reasonably unaware that Contracting was operating during the 1992 road building season. With the exception of the filing of the application for certification, throughout the period of time in question Local 793 acted as though it had bargaining rights. It pursued the Rennick grievance, sent out a delinquency notice, removed Contracting's name from the delinquency list upon being notified that Contracting had no employees, served notice to bargain, sent out the terms of the renewal MTRBA agreement, filed a "Request for the Appointment of a Conciliation Officer", and filed the instant grievance. Although the filing of an application for certification and pursuing it to a hearing before this Board can be inconsistent with an assertion of bargaining rights, given the context and timing of the application, we find, in the present case, that it is not.

54. In our view, the fact that the Labourers abandoned its bargaining rights in August, 1991, when it became apparent that its related employer application involving the Capobianco companies would not succeed, does not meaningfully assist us in determining whether Local 793 abandoned its bargaining rights. There are several factors which may have caused the Labourers and Local 793 to act differently. First, it is apparent from the Labourers' initial refusal to enter into an agreement with Contracting and the subsequent filing of the related employer application that the Labourers wanted representation rights with respect to *all* of the Capobianco companies or none at all. Local 183 only entered into an agreement with Contracting after Local 793 did. There is no evidence that Local 793 was of the view that, if it could not have representation rights for all of the Capobianco family companies, it did not want any. Rather, at the time Local 793 entered into an agreement with Contracting it had knowledge of at least one other Capobianco company. Local 793 was not a party to the related employer proceedings. These facts suggest that Local 793 was content to have representation rights with respect to only Contracting. Secondly, the Labourers abandoned its bargaining rights with Contracting because having bargaining rights with respect to only one of the Capobianco family companies was "unworkable". Notwithstanding that Contracting operated and applied the Local 793 collective agreement from August, 1990 until August, 1991, we heard no evidence that Local 793 found its agreement with Contracting to be unworkable. Contracting itself asserts that, during the period of time it applied the Local 793 collective agreement, it was not "related" to any other Capobianco family company. Hence, whereas the Labourers may have had cause to abandon its agreement, we are unaware of any cause for Local 793 to do so. Accordingly, we do not infer from the Labourers' abandonment of its bargaining rights that Local 793 did as well. In any event, the behaviour of the Labourers does not bind Local 793.

55. We do not infer from Gallagher's knowledge of the non-application of the collective agreement to Rennick's final pay cheque and the change in company name on the cheques that Gallagher was *aware* that Contracting had ceased to apply the collective agreement. With respect to the change in company name on the cheque, the evidence is that Contracting did not inform Local 793 of its payroll arrangements and reasons therefor. Absent such information, Gallagher could not have known the significance of the change in company name on the cheques. We have

found that Gallagher noticed that Rennick's final pay cheque did not provide for the wage rate stipulated in the collective agreement or the deduction of union dues. We do not infer from this fact; however, that Gallagher was aware that Contracting had ceased to apply the collective agreement. Rennick was complaining to Gallagher that he had repeatedly not been paid the wage rate stipulated in the agreement back to May, 1991. The incorrect wage rate on Rennick's final pay cheque was part of a continuing problem. Further, the pay cheque in question was Rennick's *final* pay cheque and thus problems with this cheque may have been viewed as resulting from Rennick's resignation as opposed to being symptomatic of a company wide problem.

56. The settlement of Rennick's grievance does not include damages to compensate Rennick for his lost wages during his last week of work or the Union for union dues which were not deducted from Rennick's final pay cheque. We do not infer from the terms of this settlement that the Union was acquiescing in Contracting's non-application of the agreement. First, we do not accept that Local 793 was even *aware* that Contracting had ceased to apply the agreement. Absent such knowledge, Local 793 could not have acquiesced in Contracting doing so. Secondly, although it is true that Rennick's last pay period is not covered by the grievance, nor is his second and possibly third last pay period during which, according to Contracting, the collective agreement was in force. We heard no evidence as to why the settlement did not include damages for lost wages following the week beginning August 17 but note that the reason cannot be the Union's abandonment of its agreement as damages ceased at least one week *prior* to the alleged abandonment. Finally, we note that the settlement of grievances is often a process of compromise. A party may not be able to obtain every cent that they feel is owing if they want to resolve the matter without incurring the expense of proceeding to arbitration. We do not infer from the terms of the settlement that the Union had abandoned its bargaining rights.

57. Contracting argues that the Union's delinquency notice of November 7, 1991 and notice to bargain of February 6, 1992 are not indicative of the Union pursuing its bargaining rights as they were automatically generated and mailed without any forethought. In our view, these letters are relevant as they indicate that no one within Local 793 took steps to have Contracting removed from the Union's records as a contractor bound to a collective agreement with Local 793. Had it been Local 793's intention to abandon its bargaining rights such action might have been taken.

58. Contracting submits that Capobianco's letter of November 15, 1991 in response to Local 793's delinquency notice, in which Capobianco states that there would not be remittances for the months of September, October and November "as there are no employees", is irrelevant as Gallagher did not see the letter until the fall of 1992. The fact is; however, that Capobianco's letter had the effect of removing Contracting's name from Local 793's delinquency list which Gallagher receives each month. As well, the text of the letter is inconsistent with the assertion that Capobianco believed the Union had abandoned its bargaining rights when, given the opportunity to tell the Union that Contracting was no longer bound, Capobianco created the impression that his company was still bound.

59. With respect to Contracting's assertion that the Board should infer that Local 793 knew or ought reasonably to have known that Contracting was operating during the 1992 road building season, we do not agree. The evidence clearly shows that Contracting was only engaged on smaller jobs in Board Area 8 and that in all instances the tender was put in by Paving, the contract was awarded to Paving, all equipment on site bore the name "Associated Paving" or no name and all signs on the job site said "Associated Paving". Further, Capobianco testified that he did not see anyone from Local 793 on a job site until October or November, 1992. None of the usual indicators of what jobs a contractor is working on were available to Local 793 in this case. They had no practical way of knowing that Contracting was operating.

60. Contracting submits that Local 793 was aware, or ought reasonably to have been aware, that Contracting was working on job sites, notwithstanding all the indicators that the contractor was Paving, because Capobianco and his employees were present on the site. Local 793 would have associated Capobianco with Contracting and hence known that Contracting was on site. We do not agree. First, there is no evidence that Local 793 saw Capobianco on a job site until mid-October, 1992. Second, in our view, where a contractor arranges its affairs such that none of the usual indicators that it is working exist, a union is not required to expend extraordinary effort tracking down that contractor by attending at every job site and checking the identity of those present. Such a requirement would be onerous and an inefficient use of a union's resources. We find that Local 793 was unaware until mid-October that Contracting was operating during the 1992 road building season and it was not unreasonable for Local 793 to be unaware.

61. Likewise, we do not agree with Contracting's assertion that Local 793 attempted to have Contracting removed from the Kaneff site in April, 1992 and the Memme site in November, 1992. With respect to the Kaneff site the work being performed was asphalt work which Local 793 was aware, from its earlier discussions with Capobianco, had been sub-contracted to Paving. All equipment and signage on site bore the Paving name. We accept that Local 793's complaint was with respect to Paving's presence on the site and not Contracting's. We also do not accept Contracting's argument that Local 793 viewed Contracting and Paving as related employers such that if Local 793 believed it had bargaining rights with respect to Contracting it would also have believed it had bargaining rights with respect to Paving. Local 793 did not assert that Contracting and Paving were related employers until November, 1992. There is no evidence that Local 793 was of the view that they were related employers at the time of the Kaneff incident seven months earlier.

62. In our view the incident on the Memme job site is not helpful to Contracting's case for two reasons. First, the Memme job site was located in Board Area 26. Contracting's collective agreement with Local 793 does not extend to Board Area 26. Thus, irrespective of the abandonment issue, Contracting was not a union contractor in Board Area 26 and Local 793 would have been within its rights to have Contracting removed. Secondly, based on our findings of fact set out above, it is our conclusion that Local 793 understood the contractor on site to be Paving and that it was Paving that Local 793 sought to have removed.

63. Finally, we turn to the filing of the application for certification. Although we find the filing of the application for certification with respect to Contracting troubling and agree that the filing of such an application could be construed as conduct inconsistent with the assertion that a union already holds bargaining rights, in the present case we do not view it as such. Local 793 filed its Request for the Appointment of a Conciliation Officer on October 30, 1992, six days *prior* to the filing of the application for certification. Hence, very shortly *before* the filing of the application there is a very clear assertion of bargaining rights on Local 793's behalf. In contrast to the delinquency notice and notice to bargain, the request was not automatically generated by the Union's computer or tickler systems. Gallagher specifically requested that the request be filed.

64. Further, evidence that Local 793 believed that it already had bargaining rights with respect to Contracting is found in the filing of the instant grievance. This grievance was filed on November 12, 1992. The grievance may have resulted from Gallagher witnessing Contracting working on the City of Mississauga Road Repair Contracts in mid-October. Alternatively, the grievance may have been initiated as a result of the November 10, 1992 letter, written by Contracting's counsel to the Assistant Deputy Minister of Labour, which clearly indicates that Contracting had been active without applying the provisions of the collective agreement. Although the grievance was filed following the application for certification, the grievance is an indication that Local 793 believed that it *already had* bargaining rights with respect to Contracting. Accordingly, we find

that the filing of the application for certification was an attempt on Local 793's part to certify the remainder of the Capobianco companies, which Local 793 was unable to distinguish from Contracting.

65. We agree with counsel for Contracting that pursuing the application for certification through days of Labour Relations Officer examinations and before a panel of the Board could be construed as inconsistent with the assertion that Local 793 already holds bargaining rights with respect to Contracting. We cannot think of anything more inconsistent with the assertion of bargaining rights than pursuing such rights before this Board. However, this conduct must be viewed in context. On November 10, 1992 Contracting advised the Minister of Labour of its view that Local 793 had abandoned its bargaining rights. Contracting maintains that position to date and that issue will not be resolved until the release of this decision. In our view, in light of Contracting's position that Local 793 had abandoned its bargaining rights, Local 793 was justified in pursuing its application for certification in order to protect its bargaining rights should Contracting's abandonment argument prevail.

66. Having regard to our findings this matter is remitted to the parties for their further consideration. The parties are directed to advise the Registrar, within 30 days of the date hereof, as to how they wish to proceed with this matter.

DECISION OF BOARD MEMBER FRED B. REAUME; August 5, 1994

1. Virtually all of the actions taken or not taken by Mr. Gallagher on behalf of the union with regard to this matter, give some credibility to the suggestion of an abandonment claim by the respondent.

2. Indeed the filing of the application for certification in early November, 1992 and his comments to Mr. Montagnese with regard to said application can only be construed that Mr. Gallagher did not feel confident at that point that he had bargaining rights with the respondent through the original Voluntary Recognition Agreement.

3. Furthermore the settlement of Mr. Rennick's grievance with Mr. Gallagher's assistance clearly failed to even consider Rennick's lost wages during his last week of work and the payment of union dues. Mr. Gallagher's evidence was that Mr. Rennick was *not at all happy* with his treatment by Contracting. Under these circumstances, I find it difficult to accept that Mr. Rennick did not also tell Mr. Gallagher that Contracting was operating outside the Collective Agreement. In fact, he clearly did with respect to his wage rate.

4. In spite of Mr. Rennick's complaints, Mr. Gallagher made no attempt to discuss this matter openly with Contracting or to follow up with the other Local 793 members who worked with Contracting during the time Mr. Rennick worked with Contracting.

5. Despite the apparent problems involving the Kaneff and Memme job sites in 1992, Mr. Gallagher, upon finding Contracting working non-union on the City of Mississauga road repair contracts in mid-October of 1992, takes almost a month to file the grievance. Certainly, not what one would normally expect from a union representative when such a violation has taken place with a bound company. There is no doubt in my mind that the grievance was filed as a direct result of the November 10, 1992 letter written by Contracting's legal counsel which confirms his activity outside the Collective Agreement. I believe it was filed by Mr Gallagher following discussion of the above letter with his advisers.

6. However, overshadowing all of Mr. Gallagher's shortcomings in dealing positively with

this matter is the evidence which confirms that, despite several face-to-face meetings between Gallagher and Capobianco over the entire period, there was never any *clear* confirmation or declaration made even orally *by either party* that the union no longer exercised bargaining rights with respect to Contracting.

7. In addition, I have considerable difficulty with the less than forthright practice of the respondent of constantly shielding Contracting behind the name "Associated Paving" with regard to on-site equipment identification and the exercise of commercial contracts.

8. As a result, I am hesitatingly persuaded to concur with this decision.

0961-94-R; 0962-94-U International Brotherhood of Painters and Allied Trades, Local 1494, Applicant v. Basile Interiors Ltd., Responding Party

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Employer violating Act in threatening and intimidating one employee with respect to union membership and in laying off second employee because of his union activity - Reinstatement with compensation ordered - Board determining that as result of employer's violations true wishes of employees unlikely to be ascertained - Union certified under section 9.2 of the Act

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *K. Davies*.

APPEARANCES: *Elizabeth M. Mitchell*, *Kevin Elliott* and *Victoria Starr* for the applicant; *Marilee Marcotte* and *Sam Basile* for the responding party.

DECISION OF THE BOARD; August 10, 1994

1. This is an application for certification which was heard together with a complaint of unfair labour practices. The union relies on the provisions of section 9.2 with respect to its certification application.

2. By brief written decision dated August 2, 1994, the Board found that the company had violated the *Labour Relations Act*, and that as a result of these violations, the true wishes of the employees as to union representation were not likely to be ascertained. Accordingly, the Board, in addition to remedies under section 91, certified the union as the bargaining agent for a unit of employees of this employer. The following are our reasons for these determinations.

3. In this hearing, the Board heard the evidence of Sam Basile, Peter Rocchetti, Frank Basile, Imad Manuel Yalda, Ricardo Vidal and Randy Wilmer. It is fair to say that although on some uncontroversial points the witnesses were reasonably consistent in their recounting of the facts, there were also significant differences between the evidence of the company's witnesses and the union's witnesses. In assessing the evidence and arriving at our findings of fact, we have considered all of the evidence and taken into account such factors as the demeanour of the witnesses, the clarity of their evidence, the witnesses' apparent ability to recall events and to resist the tug of self-interest in their responses to the questions, and what seems most reasonable and probable in all of

the circumstances and having regard to the evidence as a whole. Ultimately, we substantially prefer the evidence of Ricardo Vidal and Randy Wilmer to that of Sam Basile, Peter Rocchetti and Frank Basile as to the key events.

4. Basile Interiors Ltd. (referred to herein as “the company” or “the employer”) is a company specializing in interior design and painting. Sam Basile is its owner. Frank Basile, who also works for the company is the father of Sam. Sam Basile’s background is in interior design, though he has some experience in painting through working with his father, who has worked for many decades in the painting contracting business. The company is relatively small, employing at the time of this application approximately 8 persons in the painting contracting division, including the Basiles. The union began its organizing drive with respect to the painters and painters’ apprentices employed by the company in March of 1994.

5. The key events which were the subject of evidence were a meeting held on June 13, 1994 between Ricardo Vidal and, among others, Sam Basile, and the layoff of Randy Wilmer. The company’s witnesses denied that there had been a meeting on June 13 between anyone but Ricardo Vidal and Sam Basile. We prefer the version of events given by Vidal. We find that on June 13, after Vidal returned to the shop from a job site at approximately 11:30 a.m., Sam Basile asked to see him in the office. Frank Basile joined them. Gino Basile (a brother of Sam) and Peter Rocchetti (an employee of Basile who is at the least a working foreman) were also present for most of the discussion. Frank Basile asked Vidal how things were going, and whether he was having problems with the company. After Vidal responded, Frank Basile asked why Vidal had joined the union. Vidal asked “who said I joined the union”, to which Sam Basile responded that the company knew all about the union and who was in it, and wanted to know who organized it.

6. Vidal acknowledged that he had joined the union. Frank Basile became upset and angry, berating Vidal. There was further discussion in which Vidal was asked who had organized the union. Vidal was asked several times if Randy Wilmer had introduced him to the union, or joined. Finally, Vidal told them that Frank Facchineri, an employee who had been laid off in March, was responsible for starting the union drive.

7. Sam Basile placed two sheets of paper in front of Vidal. One of these was a Record of Employment. The other was a statement which Vidal described to the best of his recollection as setting out that he was being treated fairly by the company and paid his due vacation pay and holidays. This statement was not entered into evidence. Basile indicated that either Vidal sign the statement, or he would be terminated, referring to the Record of Employment which was also in front of Vidal. After Vidal signed the statement, Sam Basile took it and told him that he had talked to his attorney and if Vidal ever spoke to the other men about the union or about the meeting, the company would sue him.

8. Also during this discussion, Vidal was asked why he had joined the union. Vidal was told that the union would not be able to offer him anything. Sam Basile also expressed his opinion that the union would not be successful in its organizing drive because the company had a majority in its supporters and the union had forgotten to count Gino, Peter and Frank. At the end of the meeting, Frank Basile assured Vidal that he had his job, not to worry, and to come in to work the next day. Vidal went home after this meeting.

9. Later that day, Vidal called the company which is now his employer to inquire about employment. He met with its owner that afternoon and then again that night. The result was that

he was offered a job as a painter, at the same wages which he earned with Basile Interiors Ltd. Vidal called Sam Basile the next day and told him that he had quit.

10. In the evidence of Yalda and of Vidal, it is also clear that Vidal had been searching for other work well before the meeting of June 13. He had been unhappy with the company for some time, mainly because of what he considered to be harsh treatment by Frank Basile. On June 12, he had a conversation with Frank Basile in which Basile expressed anger at Randy Wilmer for having asked for a raise. Basile took out this anger at Vidal, and threatened to cut the pay of everyone. This appeared to be the last straw for Vidal. On June 13, while working at a job site in the morning, Vidal obtained the name and telephone number of the company which he called for work later that afternoon. Even before his meeting with Sam and Frank Basile that morning, therefore, Vidal had intended to make contact with his new employer. There is no doubt that the meeting of June 13 contributed to his decision to leave the company. Vidal went to some lengths on the night of June 13 to meet with his new employer, even working late into the night to demonstrate his painting skills. However, it is also fair to conclude from the evidence that even before this meeting Vidal was prepared to take any reasonable offer of employment as a painter which provided him with equivalent wages to that he was earning at Basile Interiors Ltd. This is exactly what was offered to him on the night of June 13. We therefore find that Vidal was intending to leave the company even before the meeting of June 13; however, it is probable that he would not have given the matter the urgency that he did had that meeting not occurred.

11. At the time of this hearing, Vidal was still working at the company for whom he left Basile Interiors Ltd. In his testimony, Vidal was asked whether he would like to return to Basile Interiors Ltd. Although his responses went back and forth, ultimately, he stated firmly that he would not go back to the company. However, he agreed with counsel for the union who asked him in re-examination whether he would want the option of returning if something happened to his new job.

12. With respect to Randy Wilmer's layoff, the evidence is that as of June 13, the persons performing construction duties in the painting division of the company consisted of Wilmer, Vidal, Yalda, Rocchetti, J.P. Galinas, Domenic Gaudio and Frank Basile. Excluding Basile, Wilmer, Vidal and Rocchetti had the longest history with the company. Rocchetti is considered a foreman (we do not need to determine whether he is excluded from the unit for the purposes of this decision.) Gaudio was hired after Wilmer and Vidal. Galinas and Yalda were hired on June 6, just one week before Wilmer's layoff. Galinas works primarily as a paper hanger, and Yalda works primarily painting and assisting the other painters. When Wilmer was hired, he had experience as a painter, but not in spraying. He learned to spray from Vidal, became adept at it, and eventually became the main sprayer for the company.

13. At the time of Wilmer's layoff, the company had four or five projects ongoing. Sam Basile testified that on Sunday, June 12, he decided that the company would have to lay off Wilmer for a while. He considers Wilmer to be primarily a spray painter. The company was waiting for the go-ahead on a spray job at Valiant Tools, a regular customer. On June 12, it appeared that this job would not be ready immediately. Basile states that during the previous week, he had a conversation with Wilmer in which Wilmer indicated that if work slowed down, he would like to take a few days off to finish a few projects (a conversation which Wilmer denies). Therefore, Basile decided on June 12 to lay off Wilmer for about a week. He asked his father to telephone Wilmer and tell him to stay home for a couple of days. Sam Basile states that on Monday, he told his father again to telephone Wilmer and tell him to stay home for a couple of days and the company would phone him when the project was ready.

14. Frank Basile testified that he was told by Sam and in turn told Wilmer on June 12 to phone the company on Monday, June 13 because he would likely be working on the afternoon shift that day. On June 13, Sam told him to tell Wilmer to stay home for a couple of days because the spray job was delayed. Part of this is consistent with Wilmer's testimony. Wilmer states that he was told by Frank Basile on Sunday, June 12 that the company would call him on June 13 about working the afternoon shift on that day. However, Wilmer states that on June 13, when he spoke to Frank Basile on the telephone, he was told to come into the office. When he arrived, Frank Basile met him and told him that he was to be laid off because the company only had work for paper hangers. He was given a Record of Employment the same date.

15. Wilmer also testified that because of an error in the ROE, he returned to the company a few days later to pick up a new one. On this visit, he saw Frank Basile again. Basile thanked him for the work he had done for the company, and told Wilmer that if he ever needed work in the future, to feel free to come and see Frank.

16. After Wilmer's layoff, the company continued to have painting projects. There was, among other things, roller and brush painting at Valiant Tools from about June 13 to June 27, which provided fairly steady work for those two weeks for Yalda, Rocchetti and Gaudio. As it turned out, the spray job at Valiant Tools was not performed until about July 4. In all, this job took less than a day.

17. Sam Basile also testified that Vidal's quit caught him by surprise, and there was work available for Vidal to perform if he had stayed. Vidal and Wilmer are about the same skill level.

18. The evidence is also that before these events, Wilmer has been laid off by the company on occasion for a day or two at a time. One time, he was told to telephone the company about work on a daily basis, and he ended up not working for a week. On none of these previous occasions, however, has he received an ROE. The ROE which was made out to him on June 13, as amended on June 17, states that the date of recall is unknown.

19. With respect to the company's knowledge of the union's organizing drive, Sam Basile states that on June 13, in a meeting with Ricardo Vidal (the details of which differ dramatically from Vidal's), Vidal volunteered the information that he had joined the union. In Basile's evidence, this was the first that he heard of the organizing drive. Yalda testified, however, that on Monday, June 13 when he arrived in the shop early in the morning, he decided to hand in his union card to the company with his timesheet. Yalda clearly felt at this time that his interests lay with the company, and in informing the company about the organizing drive. He also testified that on Tuesday, he decided to get his card back, and retrieved it from the envelope in which he had placed it together with his time sheet. There is no direct evidence that anyone in management opened this envelope and saw his union card between Monday morning and Tuesday morning.

20. However, there is evidence that during the meeting with the Basiles, Rocchetti and Vidal on Monday at about 11:30 a.m., Frank or Sam Basile referred to a "yellow" union card. The union's membership evidence is indeed yellow.

21. In cross-examination of Wilmer, company counsel asked Wilmer a question concerning further organizing attempts after his reinstatement to work on June 27 in settlement of an application for interim relief brought by the union. An objection was taken to this question, and the majority of the panel, Board Member Davies dissenting, allowed the question. In response to the question, Wilmer stated that he had attempted to discuss the organizing drive with employees after his return to work, but the atmosphere was worse than ever. No one wanted to discuss it with him.

At least one person who had previously indicated support for the union now retracted that support, although one employee who had waffled on returning his completed union card now did so.

22. There was also evidence with respect to certain incidents which occurred after Wilmer's return to work, which the union alleges constitute further harassment or discrimination against Wilmer as a result of his union activities. We have determined that it is unnecessary to make findings with respect to these, and so do not detail this evidence here.

23. The sections of the Act relied upon in these proceedings are the following:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

82.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

24. The union alleges that the conduct of the employer in, among other things, intimidating Ricardo Vidal and laying off Randy Wilmer violates sections 65, 67 and 71 of the Act. The union states that this conduct has made it impossible for the employees of this company to express their true wishes as to whether they desire to be represented by the applicant. Therefore, in addition to the remedial relief requested under section 91 of the Act, the union urges the Board to apply section 9.2 and grant certification.

25. In the company's submissions, no unfair labour practices were committed. It relies on the version of the meeting of June 13 as described in the evidence of Sam Basile. With respect to the layoff, the company states that the decision had been made on Sunday, June 12 to temporarily lay off Randy Wilmer, until the spray job at Valiant Tools was prepared to start. This decision was partly based on Wilmer's request to Sam Basile to have a few days off.

26. Further, in the event the Board finds that the company has committed unfair labour practices, the Board ought not to apply section 9.2. The union's organizing drive started in March, and by mid-June, when these events took place, it was essentially stalled. The facts in this case do not support the conclusion that the violations of the Act, if they occurred, had any chilling effect on the ability of employees at this workplace to make a free decision on union representation. Company counsel distinguishes *Carleton University Students' Association Inc.*, [1993] OLRB Rep. Oct. 938 and *CMP Group (1985) Ltd.*, [1993] OLRB Rep. Dec. 1247 on the basis of the time at which the events at issue occurred and their concomitant effect on employees in the workplace. Counsel also submits that a flaw in the union's theory of the case is with respect to the company's knowledge of the organizing drive. There is no evidence, counsel states, that the company actually saw the union card that Yalda enclosed with his time sheet. Further, even if the Board finds that the company saw this card, it cannot be said that the company could have concluded that Vidal and Wilmer were involved in the organizing drive.

27. In their submissions, the parties referred us to *Classic Masonry Inc.* [1993] OLRB Rep. Aug. 721, *Carleton University Students' Association Inc.*, *supra*, *CMP Group (1985) Ltd.*, *supra* and *Wm. J. Davidson Electric Inc.*, [1992] OLRB Rep. Jan. 101.

28. As we have stated above, on evaluating the evidence as a whole, we have decided to prefer the version of events narrated by Vidal and Wilmer over those put forward by the company's witnesses. Based on this, there can be no doubt that as of Monday, June 13, the company was aware of the union's organizing drive. We do not have to determine how they became aware of it, and whether it was because of Manuel Yalda's actions on that morning that it came to their attention. It is reasonable to conclude from the evidence, however, that it was between Sunday, June 12 and 11:30 a.m. on Monday, June 13 that they became aware of it. Further, it is also clear from the meeting between Vidal and members of management that once the company became aware of the union's presence at the workplace, they also came to some conclusions, which ultimately turned out to be accurate, as to the key persons involved. It is not surprising to us that in as small a workplace as Basile Interiors Ltd., it was not difficult for the company to make some reasonable and informed deductions as to the source of union support amongst its employees. In any event, it is clear from the discussion in this meeting, that the company had concluded that Vidal, Wilmer and Frank Facchineri were all union-supporters.

29. We find that in the meeting with Vidal on June 13, the company intimidated and harassed him as a result of his union support, contrary to the provisions of sections. There is no doubt that the intended effect of this meeting was to make Vidal think twice about his continued support for the union. The message was also conveyed that Vidal's continued employment lay solely in the company's hands, and that expressions of disloyalty to the company would be rewarded with instant dismissal. There is no doubt that this meeting had quite an impact on Vidal. He left the meeting quite shaken and, as we have described above, went to great lengths that night to find other employment.

30. The company further responded to its discovery of the organizing drive by the layoff of Randy Wilmer, whom it had concluded was instrumental in the drive. As we have commented, it would not have been difficult in this small workforce for the company to come to a reasonable conclusion as to the union supporters amongst its employees. Wilmer had also made the mistake the week before of asking for a raise. Although on Sunday, June 12, Wilmer had been told that he would be working afternoons for the next while, his status with the company completely changed by noon on Monday. At noon on Monday, he was told to come into the office, only to be informed of an indefinite layoff. The company maintains that the layoff was intended to be temporary only, while waiting for a job to begin. On the evidence, however, there are many unusual aspects about this layoff. It does not appear that it was usual for an employee to have to present himself personally in the office to be told of a layoff which was to last, on the company's evidence, for a few days to a week. Further, Wilmer was issued an ROE, which he had never received before for a layoff of short duration, and was essentially told by Frank Basile that he was no longer working for the company. The purported rationale for the layoff also does not bear up to scrutiny. The delayed job which the company states supported its decision to effect the temporary layoff ultimately turned out to be less than one day of work. On top of all of this, Wilmer was laid off while other employees of less experience and seniority than he, and in particular, one employee who had only worked for the company for a week, were retained. Even upon the quit of Ricardo Vidal, which left the company with a gap in its workforce, the company did not recall Wilmer, who had substantially the same level of experience and skill.

31. In all of these circumstances, we conclude that by laying off Randy Wilmer, the company was "cleaning house" and ridding itself of the person whom it had concluded was an instrumental union supporter.

32. As we have indicated, we find it unnecessary to make determinations with respect to other alleged unfair labour practices, either because they have been rectified, or as well because their remedies would not add anything to those we have ordered. We find it unnecessary to determine whether the company has violated section 82.

33. With respect to remedies, the union has requested on behalf of Mr. Vidal that he be given the option to return to work at Basile Interiors Ltd., to be exercised in a period of up to a month. Having regard to Mr. Vidal's evidence regarding the circumstances of his departure and in particular to his expressed unwillingness to return to work at this company, we do not find this remedial request to be appropriate in the circumstances.

34. Finally, we consider whether the violations of the Act have created a situation where the true wishes of the employees respecting union representation are unlikely to be ascertained. We determine that they have. In arriving at this conclusion, we have taken into account the size of this workplace and the closeness with which employees work with the members of management who participated in the unfair labour practices, the swiftness and severity of the company's actions upon learning of the union drive, the concern for job security which was expressed in the hearing

(and which forms the basis for the Board's conclusions regarding the chilling effect of the discharge of union supporters in cases such as this), and the evidence regarding the further organizing attempts after these events.

35. We therefore find that the statutory preconditions for the application of section 9.2 have been met and that this is an appropriate case for certification. Accordingly, we granted the declarations and orders set out in our written decision of August 2, 1994.

1678-93-M United Food and Commercial Workers International Union, Local 175, Applicant v. Branch 133 Legion Village Inc., Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board finding seniors' residential facility to be home for the aged and, thus, a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and E. G. Theobald.

DECISION OF THE BOARD; August 30, 1994

1. This is a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act*. The question which has been referred to the Board for its advise is the following:

Is Branch 133 Legion Village a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*.

Statements of representations have been filed with the Board pursuant to an agreement between the parties to have the Board make the decision on written submissions.

2. The Board has reviewed the written submissions and its advice to the Minister is that the answer to its question is yes, the Branch 133 Legion Village is a hospital within the meaning of the *Hospital Labour Disputes Arbitration Act*. The reasons for this advice follows.

3. Fundamental to the determination of the question is the definition of the word hospital in the *Hospital Labour Disputes Arbitration Act*, which is as follows:

1. (1) In this Act,

- (a) "hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

4. It is our view that the operative part of that definition is the wording in the last phrase "and includes a home for the aged". Although the Legion Village is not a hospital in the ordinary sense of the word, the statutory definition is not limited to such narrow confines. We are of the view that the Legion Village is a home for the aged.

5. A brief review of the facts submitted will serve to underline why we have concluded that the Village is a home for the aged, and thus a hospital within the meaning of the Act. The material before us indicates that the Village provides moderate priced residential accommodation for seniors, with a variety of kinds of services and care depending on the needs of the various residents. It is described in the material as a buffer between a house or apartment and a nursing home. The Ministry of Community and Social Services requires the corporation to provide health care at the health care aid professional level, but the Village has been able to attract employees with superior qualifications to that.

6. The Village services senior citizens, in self contained apartments (phase 1) for those 60 years of age and older, and in apartments with health care assistance (phase 2 and phase 3) for those 65 years of age and up. The criteria for eligibility for the apartments with the health care component are listed as follows:

- Ambulatory with or without walking aids.
- Independently mobile in wheel chair.
- Self care with limited assistance.
- Look after own medication.

Health care assistance is mainly linked with phase 2 and 3 units, and phase 1 is described as regular apartment living with no services provided. However, the phase 1 units also have suites designed for the handicapped. For phase 1 meals may be purchased in a dining room. For phase 2, two meals per day are provided as well as housekeeping, laundry and nursing services. An RNA is available for twenty-four hour emergency call, and assistance is given with baths. In the information package filed, the objectives of phase 2 are described as follows:

- “To provide a sheltered environment for people in need of assistance while encouraging and maintaining independence in the activities of daily living. To provide health monitoring and supervision as required. To provide accommodation, meals, companionship and socialization for people who, because of age or infirmity, have suffered losses in health, mobility, sensory acuity or well being”.

In phase 3 there is twenty-four hour limited nursing supervision, as well as the other services mentioned above, and three meals a day plus afternoon and evening tea are provided.

7. The union’s position is that because the Legion Village is a seniors’ residence, it should be recognized as a hospital under the *Hospital Labour Disputes Arbitration Act*. They observe that the employees have the same job classifications and duties as other nursing homes currently recognized under the *Hospital Labour Disputes Arbitration Act*. The Divisional Court has made clear in *Carefree Lodge v. ONA* (unreported decision dated November 2, 1976) that the words “home for the aged” are to be given their plain and ordinary meaning as opposed to any meaning that they may

have been given under other Acts, such as *The Homes for the Aged and Rest Homes Act*, or the *Charitable Institutions Act*. See, similarly, *Nel-Gor Castle Rest Home v. London and District Service Workers Union, Local 220*, (unreported decision of the Divisional Court dated March 19, 1985).

8. The responding party’s objection to being designated a hospital is the potential of an imposed financial burden through interest arbitration. It writes that any arbitrarily imposed financial settlement without corresponding financial support and commitment from the government or funding agents could lead to the closure of the aspect of the operation with health care assistance, since this corporation cannot support a financially deficit organization. Although the Village’s con-

cern is understandable, we are not of the view that it is a criterion which the legislature intended we take into account in determining the application of the Act. However, it is the type of concern that will likely play a major role at the bargaining table and at any subsequent interest arbitration.

9. It is our view likely that the legislature intended homes for the aged to be included in the definition of hospital whether or not they meet the test of "being operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness..." as homes for the aged are in effect deemed to be hospitals. This conclusion is also consistent with the cases referred to by the union. It is not disputed that in the ordinary sense of the words home for the aged, i.e. an institution or establishment for the shelter and care of the elderly, the Legion Village would qualify. Nor was it by either party that a different result should flow for phase 1 than for phases 2 and 3. In any event, it is clear that phases 2 and 3 would comply with the more detailed test as well since the provision of care is clearly aimed at least at observation of the elderly with some infirmity. Moreover, it appears from the material that the employees in question are providing the services to phases 2 and 3 rather than phase 1, and thus it is not necessary to make a finding with respect to phase 1.

0392-94-R; 0635-94-U United Brotherhood of Carpenters and Joiners of America, Applicant v. Canac Kitchens Limited, Responding Party

Certification - Certification Where Act Contravened - Interference with Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Employer found to have violated Act by certain statements contained in bulletins distributed to employees, certain statements made by employer at meeting with employees, and by certain statements made to two employees about soliciting support for the union - Board directing employer to post and distribute Board notice to employees, to permit union access to plant during working hours for purpose of convening meeting with employees out of presence of members of management, and to rescind written warnings given to two employees - Board declining to certify union under section 9.2 of the Act - Representation vote directed

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

APPEARANCES: *Frank Manoni* and *J. Almeida* for the applicant; *W. J. McNaughton* and *J. Capone* for the responding party.

DECISION OF PAMELA CHAPMAN, VICE-CHAIR, AND BOARD MEMBER G. O. SHAMANSKI: August 31, 1994

1. This is an application for certification in which the applicant has requested relief pursuant to section 9.2 of the Act, together with a complaint under section 91 alleging that the responding party has violated sections 65, 67 and 71 of the Act. The two matters were consolidated on consent of the parties at the first day of hearing.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties the Board further finds that:

all employees of Canac Kitchens Limited in the Town of Markham, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, installer and truck drivers.

Clarity Note: For the purpose of clarity, the parties agree that Bill man is excluded under the clerical exclusion and the lead hand designation is included in the bargaining unit,

constitute a unit of employees of the responding party appropriate for collective bargaining.

4. The Board is satisfied on the basis of all evidence before it that not less than 40% of the employees of the responding party in the bargaining unit on May 4, 1994, the certification application date, had applied to become members of the applicant on or before that date. Thus, the applicant is in the position where it is entitled under section 8(2) of the Act to a representation vote. However, the applicant is seeking certification without a vote pursuant to section 9.2 of the Act, and thus this panel proceeded to hear evidence and representations concerning that request, and concerning the complaint under section 91 of the Act.

5. Most of the facts concerning the main sequence of events in this matter are not in dispute. The application was filed on May 4, 1994, one day after the release of a Board decision dismissing an application for certification filed with respect to the same group of employees by Local 1072 of the applicant union. This decision also dismissed certain complaints made by the applicant under section 91 of the Act, and declined to order relief under section 9.2 of the Act. The allegations made by the union in that matter do not relate directly to those made in the present case, but relate instead to certain lay-offs effected by the employer during the course of the first organizing campaign.

6. The applicant union began organizing employees at the employer's plant for a second time the day after the last hearing in the first application for certification, on or about April 21, 1994. Shortly thereafter, this organizing activity came to the attention of the employer, and it issued a number of bulletins to employees concerning the actions of the employee organizers, on or about April 25 and April 27, 1994. In addition, on April 25, 1994 two of the organizers, Joao Toste and Quach Nhan Kiet were called into the office of the human resources manager, Joseph Capone, and warned that they should not campaign for the union during working hours.

7. On May 3, 1994, as the organizing campaign continued, the parties received the decision of the board in the first application for certification. At approximately 5:00 p.m. that day, the president of the company, Karl Joseph Marcus, called a meeting of all employees. While aspects of his comments at that meeting are in dispute, it is not disputed that he expressed his pleasure with the outcome of the first application and thanked all of the employees who had not signed union cards. He then went on to say that Canac would be taking a more active role in listening to the concerns of employees and communicating with them, and announced a wage increase of 5% for all employees, effective May 1, 1994, and an increase in the employer's contribution to the benefit plan from 50% to 2/3 of the premium amount. He added that if the company continued to do well that he would consider increasing the premium contribution to 100%. He concluded his comments by speaking about the need for the employees to continue to work together "as a family" in order to ensure the continued success of the company.

8. As noted above, the second certification application was filed the day after this meeting, on May 4, 1994.

9. On May 6, 1994, Quach and Toste were again called in to the office of Capone and warned that they should not be campaigning for the union during working hours. They were each

given a written memorandum which repeated this warning and stated that if they continued to do so they would be “removed from the workplace”. On the same day, the company issued a third bulletin to employees commenting on the second application for certification and the activities of the organizers.

10. The final incident dealt with in the evidence occurred after the start of the hearing in this matter, on June 4, 1994. On that day, Toste was approached by members of management as he left the premises at the end of his shift and asked about the contents of several bags which had been observed in the back of his vehicle. A dispute ensued, which ended with the police being called by Toste and the contents of the bags being examined by them. They were found not to contain any property of Canac, and Toste left. No discipline was imposed on Toste as a result of this incident.

11. The union alleges that each of the actions of the company outlined above, along with certain others described below, constituted violations of the Act, which had the effect of undermining the organizing campaign and which will prevent the true wishes of the employees as to representation by the applicant from being ascertained by a representation vote. Some of the evidence as to these events was disputed, so we will review below that evidence, our factual findings, and our legal conclusions with respect to each allegation. In making these findings of fact, the Board has assessed the credibility of the witnesses according to the usual criteria, and has weighed and assessed the testimony in the context of the relative credibility of the witnesses, the documentary evidence, and what is reasonably probable in the circumstances.

BULLETINS TO THE EMPLOYEES FROM THE EMPLOYER

12. Copies of each of the bulletins sent by the employer as outlined above were provided directly to employees, rather than simply being posted, although it was not clear in the evidence how each of the bulletins were distributed. The bulletins were also provided in translated versions to employees speaking Portuguese, Spanish and Vietnamese.

13. There was some evidence about the employer’s previous practice of communicating with employees in writing. There was no dispute that the employer had issued a similar bulletin in May, 1989, during an attempt by the Steelworkers’ union to organize Canac employees. That bulletin was translated into Portuguese, Spanish, Vietnamese and Sri Lankan. The company also asserted that it had issued a bulletin to all employees in July, 1990, explaining why there would be no wage increase that year, which was also translated into several of the languages common to employees at the workplace. The union disputed the authenticity of that bulletin, suggesting that it had been created for the purposes of this litigation, but this suggestion cannot really be taken seriously given that one of their own witnesses, Mr. Quach, recognized the Vietnamese translation of the July, 1990 bulletin and thought that he recalled receiving it at around that time. It was clear, however, that the company only rarely communicated in such a fashion to its employees, and that the most common reason for such an approach was their desire to comment on the need for a union at the workplace.

14. The first bulletin begins by identifying Toste and Quach as union organizers, and suggesting that they are playing some sort of “game” with the employees. It goes on to refer to the first application for certification, describing the status of the Board’s proceedings, and states that “(A)ny cards signed now will not help the Union, as the Labour Board will decide on only the cards already submitted and the evidence it has heard.” The final paragraph of the bulletin reads: “Our job security here is producing kitchens at very competitive prices, employees playing games about the Union doesn’t help any of us. Lets all do our job here!”.

15. The union complains that this bulletin, by identifying the organizers and suggesting that their motives were questionable and contrary to the interests of the company and the employees, effectively isolated the employee organizers from other employees by singling them out and making it clear that the company was displeased with them. The final paragraph is also of significant concern to the union, as it seems to suggest that employees' job security was endangered by the activities of the organizers. For these reasons, the applicant asserts that the bulletin violated section 65 of the Act.

16. Section 65 provides as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

17. Thus, an employer is permitted to communicate with employees about issues relating to unionization, but, as noted in *Viceroy Construction Co. Ltd.*, [1977] OLRB Rep. Sept. 562:

...by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his view of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security. (emphasis added)

18. We have concluded that portions of the first bulletin went beyond simple communication by the employer of its position and constitute violations of the Act. In particular, the repeated statement that the union organizers were "playing games" and the final suggestion that these games posed some threat to the job security of the employees would be likely to intimidate and/or threaten employees and thus violates section 65 of the Act. It seems clear as well that the bulletin was motivated in large part by the employer's desire to discredit and isolate the union organizers, in order to prevent employees from associating with them and, by implication, from signing cards, which constitutes interference within the meaning of section 65.

19. We have one further concern with the first bulletin which was not specifically identified by the union. By stating that any cards signed at that time would not help the union, presumably in reference to the first application for certification, the company may well have discouraged employees from signing cards which would have been relevant to the second application. As they knew at that time that a second campaign had begun, this statement was really a material misrepresentation, and certainly cannot be considered the expression of "views" within the meaning of section 65. As such, it too constitutes interference with the selection of a trade union and is a violation of the Act.

20. The second bulletin, issued a few days after the first, also contains statements which are of concern to the union. The organizers are once again identified and accused of "needlessly" bothering and harassing employees and playing games, as well as "trying to interfere with the company and cause as much disruption to (our) work as possible". The bulletin repeats the message of the first one that nothing the organizers and the union do now can "help the Union" or "add anything" as the case is already before the Board. In these respects it can be seen as continuing and reinforcing the violations of the Act outlined above with respect to the first bulletin, albeit in a less explicit way.

21. The third bulletin was issued after the application was filed, a few days after the meet-

ing between Marcus and the employees. It once again identifies the organizers and accuses them of bothering employees and upsetting the work of the company. It also accuses the employee organizers of organizing during working hours and advises employees that they have been warned a second time that this conduct is not permitted by the *Labour Relations Act*. Toste is accused specifically of breaching the Act by threatening employees. Most significant, according to the union, is the fourth paragraph, which states: “(W)e do not need a union here and we urge you not to sign any Union cards. You do not need to pay Union dues and you do not need outsiders interfering with our business.”

22. Like the first two bulletins, this one continues to target the organizers and accuse them of various misconduct, including, for the first time, an allegation that they were violating the Act. It also conveys directly the message that the company president does not want employees to sign union cards. While this statement might not, in and of itself, constitute a violation of section 65, it must be considered in the context of the pattern of statements issued in the three consecutive bulletins, and also the meeting held with employees a few days earlier, which is discussed below. Given our findings about the earlier bulletins, and our conclusions about the meeting between Marcus and the employees which would have “set the stage” for the statements in this bulletin, we also find aspects of this bulletin to violate the Act.

23. For the reasons set out above, we have found that the employer violated section 65 of the Act by delivering bulletins to its employees containing certain elements which breached the Act. In reaching this conclusion, we have considered not only the content of each of the bulletins, but also the number of communications received by employees within a short period of time, the repetition of certain statements, the fact that the delivery of such bulletins was not a common practice, and the fact that they were translated into several languages, unlike ordinary employer communications. These factors were likely to emphasize the importance of the bulletins to employees, and would thus amplify their coercive effect.

ALLEGED HARASSMENT OF UNION ORGANIZERS

24. In addition to the singling out of the organizers effected by the employer’s bulletins, the union has alleged that the employer took certain other steps which had the effect of interfering with the organizers’s activities, and discriminating against them in respect of their terms and conditions of employment, contrary to sections 65 and 67 of the Act.

25. The main incidents in this regard were the two meetings held by the company’s human resources manager, Mr. Capone, with two of the employee organizers, Toste and Quach. The facts concerning these meetings were largely undisputed. On or about April 27, 1994, each of the employees were approached separately by their foremen and taken by them to Capone’s office. Each of the foremen remained present during the meetings with their respective employees, and in the case of Quach, foreman Jimmy Tran provided translation of Capone’s comments. Some other individual not identified to the Board was present to translate for Toste at his meeting with Capone. Each of the employees testified that Capone told them that they were not permitted to campaign for the union during working hours.

26. The second meetings, held on or about May 6, 1994, occurred in basically the same fashion, except that someone named Gino was present as a witness at these meetings, along with the foremen and Capone, and no translator was present at the meeting with Toste, although Toste stated that he had no difficulty understanding what was said by Capone. At the second meeting Capone accused both employees of continuing to campaign on company time, and each employee testified that he denied those accusations. Capone once again warned them that this was not permitted, and handed them a memo reiterating that warning. The memos stated in conclusion that

“if you continue to do this you will be removed from the workplace”. Toste testified that when he was summoned to Capone’s office the second time he was afraid that he was going to be fired.

27. In its response, in its opening statement to the Board, and in the bulletins to employees discussed above, the company claimed that it issued these warnings to Toste and Quach in response to complaints received from other employees that the two organizers had approached them during working hours. The only evidence led by the company to substantiate that claim, however, was the question put to Capone during direct examination as to whether subsequent to the completion of the evidence in the first hearing and before the decision was released he “became aware” that Quach and Toste were soliciting union members at the plant, to which he answered “yes”. He then confirmed that he held two meetings with them at which time he warned the employees not to solicit during working hours, and that this was company policy which had been enforced during previous union campaigns. There was no further evidence offered by any management witness as to how or when information came to light which established that Quach and Toste were campaigning during working hours, and no employee witnesses were called to establish this fact first hand.

28. Employer counsel suggested in closing argument that it would have been inappropriate to call employee witnesses to substantiate the alleged complaints about the conduct of Quach and Toste, as such testimony would tend to disclose the wishes of the employees. It is not as clear to this panel as it appeared to be to counsel that only employees opposing the union would complain about being approached during working hours, but in any event it would certainly not be required of such witnesses that they expose directly their wishes as to representation, any more than that is required of witnesses called by the union. To take the proposition argued by counsel for the employer to its natural conclusion would mean that an employer could allege that certain employees had complained that membership evidence had been obtained by a union in violation of the Act, without any evidence being called from employees to substantiate those allegations, and the Board would be bound to accept those allegations as fact due to our obligation not to disclose employee wishes pursuant to section 113(1) of the Act. We do not agree that the requirements of that section prevent testimony of that sort, any more than that it prevented the employer here from calling employee witnesses to establish that in fact the two employee organizers were guilty of the misconduct alleged, or at least that the employer had some reason to believe them guilty.

29. Even if the employer had nonetheless chosen not to call evidence from employees, there was no excuse for their failure to call some direct evidence from a management witness as to the company’s reason for warning the two employees and eventually issuing a very serious threat to them by way of written memoranda. The first meeting could perhaps be explained as simply a wish by the employer to make the rules clear, but the second meeting, according to both employees, included a statement by Capone that the two employees had *continued* to organize on working time. This statement suggests both that he had some information that they had been doing so prior to the first meeting and that he believed them to be continuing, which would have been tantamount to insubordination, a very serious allegation. That these accusations were made by Capone was not contradicted by him in his testimony, so we can presume that they were indeed made; the seriousness of the warning memoranda, which include the statement “you have been campaigning on Canac work time”, confirms that this was the basis for the second meeting. It is very troubling, therefore, that *no* evidence was called by the employer to establish that the organizers were in fact violating the employer’s rules, or at least that they had some reliable source for their belief that this was occurring.

30. In light of this gap in the evidence, then, the employer’s decision to call the two employees into Capone’s office, in a formal manner which would in and of itself have been somewhat

threatening, can be seen as interference within the meaning of section 65 of the Act. This is not to say that an employer cannot issue and enforce a no-solicitation rule during working time; in fact, this Board has previously said that such rules are presumptively valid, but only *in the absence of evidence that the rule was adopted for discriminatory purpose or applied unfairly* (*The Adams Mine, Cliffs of Canada Ltd.*, [1982] OLRB Rep. Dec. 1767) (emphasis added). Here, the absence of evidence as to the reason for the company's intervention to enforce the rule with respect to the two organizers, and in particular the lack of evidence about the second and quite serious intervention, leads us to conclude that the rule was applied arbitrarily and thus unfairly. As such, the employer's actions constituted a violation of section 65 of the Act, which was exacerbated by the employer's decision to publicize its assertion that the organizers were acting improperly and that they had been warned in several of the bulletins to employees. Furthermore, to the extent that the warnings contained in the memoranda issued on May 6 constituted a threat, presumably of dismissal, section 67(c) of the Act was violated as well.

31. In addition to the meetings with Capone, there were several further allegations of harassment made by union organizer Quach. Chief among these was his assertion that the production quota for his position was increased during the period he was organizing for the union, in an attempt to keep him too busy to work for the union, and also to try to fire or demote him because of his inability to meet the standard. This belief was confirmed, according to Quach, by a conversation with his foreman which he testified occurred after the second meeting with Capone, during which his foreman said that if he continued to engage in union activity during working hours he could be assigned to another job which he might not like, like cleaning the toilets. He also asserted that Tran told him not to talk during work hours and that he watched him closely as if he was suspicious that he was talking about the union.

32. The evidence about the production standard applied to Quach's position is somewhat puzzling. It was not disputed that in the position of Upper Puller Quach was assigned a production standard measured in terms of the number of doors "pulled" during a shift. Early in 1993, Quach worked on a 7:00 a.m. to 5:00 p.m. shift and his production quota was 2300 doors. At the end of 1993 the company went to short hours due to a slowdown in work, and the production standard was reduced correspondingly, to 1980 doors in a 7:00 a.m. to 3:30 p.m. shift. In April 1994, the company went back to the regular longer shift, and the standard was increased, originally to 2300 doors and then after a day or two to 2560 doors.

33. Quach testified that on a regular shift when the standard was 2300 doors he could sometimes make that target, depending on how difficult the particular orders were, but that generally he pulled between 2100 and 2300 doors. He described the target of 2560 doors as "impossible", and said that he had expressed this opinion to other employees who agreed with him. There was no dispute that the same production standard was applied to both Quach and the other Upper Pullers.

34. There is some dispute as to whether or not Quach discussed the new production standard with his foreman, Jimmy Tran. Quach says that when Tran gave out the forms containing the new standard that Tran said that this was the new standard according to Frank Converso, the plant manager, and that employees were expected to do their work "accordingly". He took this to mean that he was supposed to produce these numbers. Tran, on the other hand, said that Quach complained to him that the number of doors was too high, and that he told him just to do as many as he could, to do his best.

35. What was missing from all of the evidence, however, was an explanation of the increase from 2300 to 2560 doors, which according to the evidence of the company occurred sometime around May 2, 1994, in the middle of the organizing campaign. It was suggested in the company's

opening statement that the increase to 2300 from 1980 doors would be explained by the increase in the hours, and this evidence was indeed undisputed. It was further suggested that the increase to 2560 was a mistake caused by some miscalculation, and that evidence would be called that foremen were aware of the correct, lower number and were to advise employees accordingly. None of these facts were adduced in the evidence of Tran, and in fact he seemed to be of the view that 2560 was the correct production standard. No further evidence was called to provide any further explanation. It thus remains puzzling that the production standard was increased at this time to a level which certainly Quach, and even Tran, seemed to acknowledge was unreachable.

36. Despite these reservations about the lack of information provided to us, however, we are unable to conclude that the increase in the production standard was motivated by any anti-union animus, or even that it was directed specifically at Quach for any reason as it was applied across the board. There was no evidence that Quach was actually required to meet this standard, and certainly no suggestion that he was or would be disciplined or otherwise affected by his inability to do so. In fact, Tran acknowledged frankly that none of the employees met the new standard. While Quach's apprehension about the new standard is understandable, then, particularly as it came during an already stressful time for the organizers, there is simply no evidence to support that the imposition of the new production quota constituted a violation of the Act.

37. The final evidence concerning alleged harassment of Quach by Tran related to the conversations in which Tran said that Quach might end up cleaning toilets, and in which Tran told Quach not to speak to other employees during working hours, along with a general allegation that Tran watched Quach closely. Tran does not dispute that two conversations of the general nature described by Quach occurred, but there is some disagreement as to timing, particularly with respect to the first conversation. Tran says that he did suggest to Quach that he might end up doing another job, perhaps cleaning toilets, but that this was in reference to poor performance on his part shortly after his return from layoff, which would have been sometime in March or early April, before the organizing campaign began. Quach is adamant that the conversation occurred after May 6, 1994, and that it was referenced to him engaging in union activity during working hours. The conversation was not attributed to any time period in the particulars filed by the union on May 19, 1994. On cross-examination, Tran admitted that other employees do not always meet the production standard, but that he had never threatened an employee other than Quach with a job change if they did not do so. He also admitted that Quach was an "OK" employee, as good as the other pullers.

38. With respect to the second conversation and the allegation that Tran watched Quach closely, Quach's evidence was less than clear about the particulars of these complaints. Tran admitted that he had told Quach shortly after his return from layoff not to talk to other employees, after another employee who was passing from reception stopped to speak to Quach. On cross-examination, Tran admitted that it was the other employee who initiated the conversation by visiting Quach at his workstation, and acknowledged that Quach continued to work while he talked. Quach gave no evidence about the timing of this conversation, and absolutely no particulars about the allegation that Tran watched him closely. Tran was not cross-examined directly about that allegation.

39. Given the evidence on these further allegations of harassment by Tran of Quach, we are simply unable to make any clear findings as to the motivation of Tran and/or the relationship of these events with Quach's union activity. While it is clear that Tran did threaten Quach at some point with the prospect of cleaning toilets, which would be a reasonably intimidating statement, we cannot conclude, given the conflicts and inconsistencies in the evidence, that this threat was directed at limiting or ending Quach's union activity. Similarly, it appears that Tran gave Quach an

unusual directive that he not speak to employees during his working hours, but the union failed to establish that this even occurred during the timeframe of the organizing campaign. Tran really provided no explanation for his conduct in these respects, despite admitting that he did not impose comparable restrictions or make similar threats to other employees, making his actions somewhat suspicious. On the evidence led, however, we cannot conclude that his actions constituted violations of the Act.

40. As noted above, there was also evidence about further alleged harassment of union organizer Toste during an incident which occurred on June 4, 1994, after the hearings in this matter had begun. While some of the facts relating to this incident were disputed, most were not. On Saturday, June 4, 1994, the plant was operating, with employees scheduled to work until 11:00 a.m. At approximately 9:30 a.m., Toste asked his foreman, Carmen DiFrancesca, if he could leave work at 10:00 a.m. DiFrancesca told him that he would prefer him to stay until the end of the shift at 11:00 a.m., but agreed that Toste could go to see another employee before the end of the shift. Toste claims that DiFrancesca should have known from what he said about this errand that he would be meeting Ferreira at the end of his shift, outside of the plant, to pick something up. DiFrancesca stated, however, that he was surprised to learn that Toste had left the plant, as Ferreira worked in the same building. Balancing all of the evidence on this point, we have concluded that Toste did not make it clear that he would be leaving the plant building, or that he would be picking something up which he would leave in his car.

41. Toste's car was observed leaving the plant parking lot to meet Ferreira down the street at another company lot, and then returning, by Vince Bruno, the customer service manager who was patrolling the parking lots. He testified that he patrols the lots in his car in part because there is a problem with theft from the company. He considered Toste's departure from and return to the lot during working hours to be unusual, and thus alerted Lou Farrace, the chief financial officer, to whom he reports. When Farrace and Bruno approached Toste's car, they observed it to contain several full green garbage bags. Bruno had not seen Toste transfer the bags to his car from Ferreira's, as he could not see that far from his vantage point in the plant parking lot. Neither Bruno nor Farrace knew to whom the car belonged, but they eventually identified Toste as the driver with the assistance of DiFrancesca.

42. After identifying the car as Toste's, DiFrancesca returned to the work area, and spoke to Toste, expressing concern that he had left the plant and that he was gone so long. Because DiFrancesca said nothing about the bags or any allegation of theft, Toste suggested that there was a plan to ambush him at the car. We accept the evidence of DiFrancesca and Farrace, however, that DiFrancesca did not approach closely enough to see the bags in the car and that he was not told of their presence initially.

43. DiFrancesca examined Toste's time card and determined that he had not punched out when he left the plant, and reported this to Farrace. At this point he was advised that there had been bags in Toste's car and that there was some concern about a possible theft. In the interval, Farrace had consulted with the plant manager, Frank Converso, who had advised him to do whatever he felt appropriate. Farrace resolved to speak to the employee and ask about the bags, and testified that he felt it most appropriate to do this at the vehicle where the bags were located in case the employee wanted to show him what was in the bags.

44. Just after 11:00 a.m., Farrace and DiFrancesca walked out to the lot and approached Toste's vehicle. There is a dispute as to what then occurred. Farrace and DiFrancesca both testified that they approached the car as Toste and two passengers were getting into it, and that Farrace politely asked Toste what was in the bags in the car. Toste's response was to get extremely agitated

and to begin screaming at them that he had not stolen anything. He is also alleged to have said several times that maybe there was something belonging to Canac in the bags. It is not disputed that he began insisting that the police be called, and that eventually one of the employees travelling with him, Ram Geer, went into the plant office and called them. By the time this occurred, Farrace and DiFrancesca had left the area of the car and returned to the plant.

45. In the version of events alleged by Toste and the two employees present, they were all in the car, it had been started and they had begun to pull out of the spot when Farrace and DiFrancesca approached. They testified that Farrace and/or DiFrancesca threw up their hands and shouted, in a violent fashion, that they must stop the car as something had been stolen from Canac and they wanted to search. From there, the description of the altercation resembles that of the management witnesses, with all witnesses agreeing that Toste got extremely agitated and did not always make sense. None of the union witnesses, however, testified that Toste had ever said that there were things belonging to Canac in the bags.

46. Once the police arrived, the dispute was quickly resolved. The police looked into the bags and confirmed that they contained clothes, and spoke to management in the plant office. Geer and the other employees then left. No discipline resulted from this incident.

47. The union asks us to conclude that the employer's intervention with Toste concerning the bags in his car was motivated by anti-union animus, and also that the way in which they handled the incident, which was alleged to be unduly confrontational, was dictated by their knowledge that Toste was a union organizer. While the timing of the incident was unfortunate, and undoubtedly affected the way both parties reacted to it, we are unable to conclude that there was any anti-union animus on the part of Farrace or DiFrancesca when they approached Toste concerning the bags. Nor are we convinced, as the union alleged, that Farrace's decision to confront Toste at the car was dictated by anti-union animus on the part of plant manager Frank Converso. Rather, we are satisfied that Farrace was legitimately concerned about the implication of the rather unusual conduct witnessed by Bruno that morning, together with the presence of the bags in the car. While as it turned out these activities had a perfectly rational explanation, none of the members of management were in possession of sufficient information at the time these events came to light to explain them without the assistance of Toste.

48. As is clear from the facts recited above, Toste completely refused to co-operate in providing additional facts which would have quickly resolved the matter, despite even the suggestion from Bhaam Prasad, one of the employees present, that he simply reveal what was in the bags. While Toste's reaction may not have been surprising given his previous experiences as a union organizer, including the events detailed above, his agitation only served to further inflame an already difficult situation.

49. We are also unable to conclude that the management officials present at the altercation handled it in an overly confrontational manner, or that their approach was dictated by their knowledge of Toste as a union supporter. Of all the witnesses we heard from about the events that day, we prefer the testimony of DiFrancesca, Toste's foreman, and an individual who was somewhat removed from the events, as he did not make the decision to intervene with Toste and had not been directly involved in any of the other allegations made concerning management's response to the union campaign. In addition, DiFrancesca openly acknowledged during cross-examination that he and Toste have always had a good relationship during the 12 years that they have worked together, and that he believed that it was impossible that Toste could have stolen something given his knowledge of the man. He even confirmed that he had stated this to Farrace at the time of the incident. We were impressed by the straightforward manner in which DiFrancesca gave his evi-

dence, and for all these reasons have concluded that it is more likely than not that the approach by management to the vehicle was as described by him. There was nothing in that approach which was inappropriate given the information that the two managers possessed at that time.

50. For these reasons, we have concluded that the actions of Farrace and DiFrancesca on June 4, 1994, did not constitute violations of the act.

MEETING BETWEEN MARCUS AND THE EMPLOYEES ON MAY 3, 1994

51. Most of the facts concerning this incident were not in dispute, and are reviewed in paragraph 7 above. The meeting called by Marcus appears to have been organized fairly quickly, immediately after the employer received the news of the Board's decision on the afternoon of May 3, 1994. It is also clear that a meeting between the owner and the employees was a very unusual event: the employer suggested that such a meeting had taken place in 1990, when no wage increase was given, but this fact was never asserted conclusively in the evidence. Otherwise, it appears that such a meeting had never occurred before.

52. The only real dispute as to the statements made by Marcus are whether or not he said that employees must not sign cards for the union, and what exactly he said about the level of wage increases obtained at other workplaces. Marcus and Capone, who was present at the meeting and produced notes that he claimed to have made shortly after its conclusion, both testified that Marcus did not say that employees should not sign union cards. They also recall that Marcus said that the average wage increase was 1.7 %, which information was obtained from an article in the Toronto Star dated February 25, 1994, which was admitted into evidence. The same article said that unionized employees were receiving average increases of 1.3%.

53. Ram Geer, an employee who was present at the meeting, was the chief witness for the union with respect to Marcus' comments. He repeated basically the same comments as Capone had recorded, with two exceptions. He recalled that Marcus commented that "the union was only giving 1.3%", while he would be giving an increase of 5%. This could certainly be interpreted as a reference to the average increase for unionized employees cited in the same Star article. He also recalled that Marcus told employees that they must not sign any cards for the union or any paper. It was suggested to Geer on cross-examination that he might be recalling the statements made by Marcus in the bulletin distributed to employees on or about May 6, 1994, in which he said "we urge you not to sign any Union cards", rather than any comments made orally during the meeting. Geer continued to insist, however, that this statement had been made at the meeting.

54. The only other witness called by the union who testified as to the meeting was Quach, who testified through an interpreter that he only understood some of Marcus' comments as his English is not very good. He recalled the announcement of the wage and benefit increases, and also that Marcus said that Canac won and the union lost. He did not, however, testify that he heard anything about not signing union cards.

55. Having heard Quach testify as to his comprehension of various conversations in English with others, including his statement that he is able to communicate well enough with his lawyer, Mr. Manoni, and that he understood, before translation, what Capone said to him in the meetings about organizing, we think it likely that he would have understood and recalled if Marcus had said anything as direct about the union as was suggested by Geer. This finding, combined with the lack of any other employee witnesses claiming to have heard Marcus forbid the signing of union cards, and the confusion that could well have arisen in the mind of Geer between the statement made in the meeting and the statements made in the bulletin released almost immediately thereafter, leads us to the conclusion that the comment concerning the signing of cards attributed to Marcus by

Geer was not made in the meeting on May 3, 1994. (It is also possible that Geer felt that this message was implicit in Marcus' comments about employees who had and had not signed cards in the first campaign, which are discussed below.)

56. We are less certain as to what exactly was said concerning average wage increases in other workplaces. In its particulars filed May 5, 1994, the union claimed that Marcus had said during the meeting that "unions are negotiating 3% increase". That was subsequently changed to 1.3% in the testimony of Geer. Capone's notes, meanwhile, say that Manoni "announced the wage issue talking about the average being 1.7% in the workforce". Given that both figures, 1.7% for workplaces generally and 1.3% for unionized workers, appear in the newspaper article that the employer claims was its source for the comments, it does seem likely that the 1.3% figure was mentioned by Marcus during the meeting; if it was not, it is hard to explain how the union could have happened upon at first 3% and then 1.3% (an easy mistake for a listener) as the figures they claim were cited with respect to employees represented by unions. It is most likely, we find, that both figures were cited during Marcus' talk.

57. Counsel for the union submitted that the comments made by Marcus at the meeting and the provision of a wage increase constituted undue influence upon the employees. Counsel for the employer urged us to find that the provision by an employer of a wage increase in these circumstances, outside of the statutory freeze period as the first certification application had been dismissed and the second not yet filed, was not a violation of the Act. In fact, he asserted that for the employer to have not given the increase because of the organizing campaign would have itself constituted a violation of the Act. This argument was considered by the Board in *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461, in which the Board concluded that section 64 (now section 65) must be read in conjunction with section 79(2) (now section 81(2)) in determining the propriety of the increase. This conclusion, however, seems to relate very particularly to the facts in that case, which involved "the implementation of a wage increase that was planned by the respondent and announced to employees before the respondent was notified of the application for certification" (at para 21). In those circumstances, it is not surprising that the Board was concerned that a failure to implement the planned wage increase would have constituted a violation of the freeze provisions in the Act.

58. In the present case, it is not clear that any wage increase, much less one of 5%, had been decided upon prior to Marcus' meeting with the employees. The only evidence from the employer as to its plans in that regard is that of Capone, who said that there had been "rumblings back and forth" about whether or not there would be a wage increase, and if so of how much, prior to May 3, 1994, but that there had been no formal meeting. He stated further that it was Marcus' decision. When asked what he knew of Marcus' intentions, he said simply that Marcus intended *during the speech* to give an increase of 5% across the board. This gives us no clue as to when Marcus made up his mind, and leaves open the possibility that he decided only after he learned of the Board's decision, or after he learned that the union was once again attempting to organize the employees. Marcus did not testify on this issue, so the question of the timing, and thus the spectre of anti-union animus playing a role in his decision, remains open. These facts distinguish the case clearly from *Ottawa General Hospital*, *supra*.

59. On the other hand, it is clear that annual wage increases, when they are granted, have always been implemented in May. The previous year an increase of 3% had been granted effective May 1, 1993, the first increase since 1989. An exhibit filed at the hearing suggests that in 1989 and 1988 5% increases were implemented. Wages were not raised in 1990, 1991 and 1992, we were told, because Canac and the kitchen cabinet industry generally had been hard hit by the recession. While the union suggests that this pattern discloses that the company only raises wages when

threatened by unionization, as they were in 1989 and again in 1994, this theory doesn't explain the increases in 1988 and 1993. Rather, it seems clear that increases have varied depending on the performance of the company. This could explain the 1994 increase, as we were told that the company was doing well and had recently obtained several large orders.

60. The increase in the employer contribution to benefit premiums was also explained in terms of the company's improved performance. In 1990, the same year that a wage increase was first denied, the company reduced its contribution to the employee benefit plan to only 50% of the premium amount. Evidence confirmed that this was an extremely unpopular move. At the meeting on May 3, 1994, Marcus announced a return to the previous level of contribution, and also stated that he would consider paying a full 100% of the premiums if the company continued to do well.

61. In *The Globe and Mail*, [1982] OLRB Rep. Feb. 189, the Board considered the mischief that may arise from an employer granting benefits or soliciting employee grievances during the course of a union organizing campaign:

• • •

48. There is nothing in the Act which prohibits an employer whose employees are unorganized and who are not the subject of a union organizing campaign, from providing terms and conditions of employment [sic] which are designed to, and may have the effect of causing employees to turn their back on the option of collective bargaining. However, once a trade union begins to organize, it is protected by the provisions of section 64 of the Act and the employer is prohibited from acting with an intention to interfere with the selection of a trade union or the representation of his employees by a trade union. The section enshrines the employer's freedom to express his views but makes it an offence to use "coercion, intimidation, threats, promises or undue influence" as a means of thwarting the rights of the trade union and/or its employees. The granting of benefits or the solicitation of employee grievances during the course of a union organizing campaign if motivated even in part by a desire to undermine the trade union, breaches these prohibitions. Regardless of whether this type of activity is characterized as an attempt to threaten employees, as it has been by the *United States Supreme Court in Exchange Parts*, or as an attempt to make unlawful promises or as an attempt to unduly influence employees, it constitutes an unlawful interference with the trade union and with the right of employees to choose a trade union.

49. The threatening aspect of this type of employer conduct arises, in the words of the U.S. Supreme Court, because "employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and may dry up if it is not obliged." Employees may as easily infer from this type of employer conduct that the benefits conferred, which have not heretofore been enjoyed, will continue or that the grievances solicited, which have heretofore not been considered, will be addressed, if the union is defeated. When considered in this light the conferring of benefits or the solicitation of grievances during the course of a union organizing campaign may also be described as a form of promise that conditions will be maintained if the efforts being made by employees to form a trade union are discontinued.

50. The *Labour Relations Act*, in addition to prohibiting threats and promises designed to interfere with rights under the Act, makes it an offence for an employer to interfere with the representation of employees by a trade union by resort to "undue influence". The meaning of that term, as used in section 64 of the Act, is defined in *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 60 at p. 70 as follows:

In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:

"The unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract."

In the context of *The Labour Relations Act* undue influence includes the unconscionable use by an employer of its power or authority over employees in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.

The Board has long recognized the sensitive nature of the employer-employee relationship and the position of dominance enjoyed by the employer. The employer decides who will work and under what terms and conditions of employment. The employer is in a position to respond to employee concerns or to ignore them. The scheme of collective bargaining provided under the Act is designed to place employees on a more equal footing with their employer. If, when faced with a move by employees to avail themselves of collective bargaining, an employer uses his authority to confer benefits or to otherwise improve the terms and conditions of employment, and does so with a purpose of undermining the trade union, must it be found that the employer, given the extent of his authority within the employment relationship, has exercised undue influence? The answer, regardless of the coexistence of a business motive, if yes. An employer who takes advantage of and relies upon his control over the employment relationship in this manner unduly influences his employees in contravention of the Act.

62. In this case, the union asks us to find that the comments of Marcus to employees concerning his intention to improve communication with employees and to listen to their concerns, and most importantly his announcement of retroactive wage and benefit increases, constitute undue influence in the sense it was described in *The Globe and Mail*, *supra*. Having carefully examined the circumstances surrounding the announcement of these improvements, and in particular the previous pattern of providing such benefits, we are not convinced that the increase, *in and of itself*, constituted a violation of the Act. We are satisfied, however, that the *manner* in which the company chose to announce the increase did constitute undue influence upon the employees, within the meaning of section 65 of the Act.

63. As noted above, meetings of this sort, particularly with the owner himself, were extremely unusual, and had certainly not been standard procedure for informing employees of wage and benefit increases. Marcus began the meeting by speaking of the union's previous application to the Board, and expressing his pleasure at the defeat of that application. He went on to thank all employees who had not signed cards, and to say of those employees who had supported the union that he had nothing to say about them. These comments about the union were then followed immediately by the announcements about a new approach to dealing with employee concerns and both wage and benefit increases. We have concluded that by linking this conferring of benefits and solicitation of employee grievances with the earlier comments about the union and about union supporters, which carried the clear message that Marcus wanted employees to defeat the union and that he would be happy with those who assisted in this effort (and, conversely, unhappy with those who did not), Marcus sent an implicit message to employees that his generosity was related to the company remaining non-union. The weight of this message was enhanced by Marcus' status as the owner, a person with whom most employees would have little contact, and was reinforced by the bulletins employees received both before and after the meeting, also from Marcus, making his views about unionization clear. In this particular context, then, the announcement of a wage and benefit increase, and the comments about soliciting employee grievances, constituted violations of section 65 of the Act.

REMEDY

64. We have found that several of the actions of the employer in this matter constituted violations of sections 65 and 67 of the Act. In order to grant certification without a vote pursuant to section 9.2 of the Act, however, as requested by the applicant, we must also be satisfied that these

violations have resulted in a situation where the true wishes of the employees are not likely to be ascertained by a representation vote. As numerous previous decisions of this Board have made clear, this requirement makes relief under section 9.2 an exceptional remedy.

65. The Board has generally granted certification without a vote pursuant to section 9.2 in one of two types of situation, as reviewed in *The Globe and Mail*, *supra*, at paragraphs 60 and 61: where an employer has “made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified”; and also “where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice”.

66. In the present case, aspects of both of these types of violations are present: threats to the job security of the employees were implicit in statements made in the bulletins, particularly the first one, and also in some of the comments made by Marcus at the meeting with employees; and we have found a pattern of violations extending over the whole period of the organizing campaign. Nonetheless, we are not convinced that the misconduct which we have identified would be likely to prevent the true expression of employee wishes in a vote. In reaching this conclusion we have considered a number of factors: the absence of any direct threats to the employees about job security, or about involvement with the union; the fact that the interference with union organizers was not substantial and was to a large extent kept quite private (excepting the comments in the bulletins); and, the fact that no dismissals or even serious discipline of union organizers or supporters were carried out.

67. Most importantly, we have considered the availability of other remedial responses to redress the unfair labour practices we have found, and to restore an environment conducive to a free expression of wishes by way of a vote. One factor in assessing the likely effect of such remedial efforts on the environment for a vote is the size of the workforce, as employees in a small workplace are likely to feel less protected by the confidentiality requirements of a secret ballot. In this case, there are more than 400 employees in the bargaining unit. We are satisfied, therefore, that intervention by the Board to remedy the unfair labour practices in the manner set out below, carried out before the holding of a representation vote, should enable employees to make a voluntary decision as to whether or not to support the applicant, and that the true wishes of the employees can thus be ascertained by way of a vote.

68. For the foregoing reasons, the Board hereby declares that the responding party has contravened sections 65 and 67 of the *Labour Relations Act*, and orders that the responding party:

- (1) post immediately copies of the attached notice marked as “Appendix” in English, Portuguese, Spanish and Vietnamese, after being duly signed by Karl Marcus, in conspicuous places in its plant, where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material;
- (2) distribute a copy of the attached notice marked as:

“Appendix” to each employee in the bargaining unit, in the language of that employee if it is Portuguese, Spanish or Vietnamese, otherwise in English, in the same fashion as the bulletins issued by

the employer between April 24 and May 6, 1994 concerning the activities of the union were distributed, whether by hand delivery, mail to employees' homes, or enclosure in a pay envelope; such distribution is to be completed at least one week prior to the taking of the representation vote in this matter;

- (3) permit the applicant access to its plant during working hours for the purpose of convening a meeting of up to one hour, at a time satisfactory to the applicant and in any event prior to the taking of the representation vote in this matter, to address employees with respect to unionization, out of the presence of any member of management; and,
- (4) rescind the written warnings received by Quach and Toste in respect of union solicitation during working hours, and remove them from their employment records.

The Board shall remain seized to resolve any disputes arising out of the implementation of these orders.

69. Having regard to the findings in paragraph 4 above, a representation vote will be taken of the employees of the responding party in the bargaining unit. All those employed in the bargaining unit on August 31, 1994, who are so employed on the date the vote is taken, will be eligible to vote.

70. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

71. A Labour Relations Officer is hereby appointed to confer with the parties with respect to the arrangements for the taking of the representation vote directed by the Board.

DECISION OF BOARD MEMBER P. V. GRASSO: August 31, 1994

1. I dissent with respect of the majority decision in ordering that a representation vote be taken of the employees in the bargaining unit.

2. I concur with the majority decision in finding that the employer has contravened sections 65 and 67 of the *Ontario Labour Relations Act*.

3. Paragraphs 18 and 19 of this decision state:

18. We have concluded that portions of the first bulletin went beyond simple communication by the employer of its position and constitute violations of the Act. In particular, the repeated statement that the union organizers were "playing games" and the final suggestion that these games posed some threat to the job security of the employees would be likely to intimidate and/or threaten employees and thus violates section 65 of the Act. It seems clear as well that the bulletin was motivated in large part by the employer's desire to discredit and isolate the union organizers, in order to prevent employees from associating with them and, by implication, from signing cards, which constitutes interference within the meaning of section 65.

19. We have one further concern with the first bulletin which was not specifically identified by the union. By stating that any cards signed at that time would not help the union, presumably in reference to the first application for certification, the company may well have discouraged employees from signing cards which would have been relevant to the second application. As

they knew at that time that a second campaign had begun, this statement was really a material misrepresentation, and certainly cannot be considered the expression of “views” within the meaning of section 65. As such, it too constitutes interference with the selection of a trade union and is a violation of the Act.

4. At paragraph 20, making reference to the second bulletin issued by the employer, the majority finds:

... The bulletin repeats the message of the first one that nothing the organizers and the union do now can “help the union” or “add anything” as the case is already before the Board. In these respects it can be seen as continuing and reinforcing the violations of the Act outlined above ...

5. At paragraph 22, making reference to the third bulletin issued by the employer the majority finds:

22. Like the first two bulletins, this one continues to target the organizers and accuse them of various misconduct, including, for the first time, an allegation that they were violating the Act. It also conveys directly the message that the company president does not want employees to sign union cards.

... Given our findings about the earlier bulletins, and our conclusions about the meeting between Marcus and the employees which would have “set the stage” for the statements in this bulletin, we also find aspects of this bulletin to violate the Act.

6. In paragraph 30 the majority have found that the employer contravened sections 65 and 67.

7. Again, the employer was found in contravention of the Act in paragraphs 62 and 63 of this decision which states:

62. In this case, the union asks us to find that the comments of Marcus to employees concerning his intention to improve communication with employees and to listen to their concerns, and most importantly his announcement of retroactive wage and benefit increases, constitute undue influence in the sense it was described in *The Globe and Mail, supra*. Having carefully examined the circumstances surrounding the announcement of these improvements, and in particular the previous pattern of providing such benefits, we are not convinced that the increase, *in and of itself*, constituted a violation of the Act. We are satisfied, however, that the *manner* in which the company chose to announce the increase did constitute undue influence upon the employees, within the meaning of section 65 of the Act.

63. As noted above, meetings of this sort, particularly with the owner himself, were extremely unusual, and had certainly not been standard procedure for informing employees of wage and benefit increases. Marcus began the meeting by speaking of the union’s previous application to the Board, and expressing his pleasure at the defeat of that application. He went on to thank all employees who had not signed cards, and to say of those employees who had supported the union that he had nothing to say about them. These comments about the union were then followed immediately by the announcements about a new approach to dealing with employee concerns and both wage and benefit increases. We have concluded that by linking this conferring of benefits and solicitation of employees grievances with the earlier comments about the union and about union supporters, which carried the clear message that Marcus wanted employees to defeat the union and that he would be happy with those who assisted in this effort (and, conversely, unhappy with those who did not), Marcus sent an implicit message to employees that his generosity was related to the company remaining non-union. The weight of this message was enhanced by Marcus’ status as the owner, a person with whom most employees would have little contact, and was reinforced by the bulletins employees received both before and after the meeting, also from Marcus, making his views about unionization clear. In this particular context, then, the announcement of a wage and benefit increase and the comments about soliciting employee grievances, constituted violations of section 65 of the Act.

8. In view of the findings of contravention of the Act by my colleagues as above indicated, I find that the employer unlawfully interfered with the union organizing campaign, and in the circumstances of this case the preconditions necessary to the issuing of a certificate pursuant to section 9.2 of the Act have established.

9. How many times does an employer have to be in contravention of the Act before section 9.2 is triggered? As noted by the majority, this employer has contravened the Act at least a half a dozen times.

10. Having unanimously found numerous contraventions of the Act by this employer, I would have found on the evidence before us, that the true wishes of the employees are not likely to be ascertained in a representation vote. I would have certified the applicant.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A HEARING ARISING OUT OF THE EFFORTS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY CERTAIN OF THE STATEMENTS CONTAINED IN BULLETINS DISTRIBUTED TO EMPLOYEES, CERTAIN STATEMENTS MADE BY ME AT A MEETING WITH EMPLOYEES ON MAY 3, 1994, AND BY CERTAIN STATEMENTS MADE TO MR. QUACH AND MR. TOSTE ABOUT SOLICITING FOR THE UNION. THE DETAILS OF THESE FINDINGS ARE SET OUT IN THE FULL DECISION OF THE BOARD IN BOARD FILES '0392-94-R/ 0635-94-U.

THE BOARD HAS ALSO ORDERED THAT A REPRESENTATION VOTE OF EMPLOYEES BE HELD, TO DETERMINE WHETHER OR NOT EMPLOYEES WISH TO BE REPRESENTED BY THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA IN THEIR EMPLOYMENT RELATIONS WITH CANAC. DETAILS OF THE REPRESENTATION VOTE WILL BE POSTED AS SOON AS THEY ARE PROVIDED BY THE BOARD.

THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES:

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS:

WE WILL DISTRIBUTE A COPY OF THIS NOTICE TO EACH EMPLOYEE IN THE BARGAINING UNIT, IN THE LANGUAGE OF THAT EMPLOYEE IF IT IS PORTUGUESE, SPANISH OR VIETNAMESE, OTHERWISE IN ENGLISH;

WE WILL PROVIDE THE UNION WITH ACCESS TO OUR PLANT DURING WORKING HOURS FOR THE PURPOSE OF CONVENING A MEETING OF UP TO ONE HOUR TO ADDRESS EMPLOYEES WITH RESPECT TO UNIONIZATION OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT;

WE WILL RESCIND WRITTEN WARNINGS THAT WERE ISSUED IN RESPECT OF UNION SOLICITATION DURING WORKING HOURS, AND REMOVE THEM FROM OUR RECORDS;

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

CANAC KITCHENS LIMITED

PER:

KARL J. MARCUS
C.E.O.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 31ST day of AUGUST, 1994.

1576-94-M Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Applicant v. 947465 Ontario Ltd., c.o.b. as **Checker Limousine and Airport Service**, G. Hanlon Holdings Inc., G. J. Hanlon (“Hanlon”) and J. Orendorff, Responding Parties

Change in Working Conditions - Interim Relief - Related Employer - Remedies - Unfair Labour Practice - Board making interim order directing employer to rescind or suspend operation of new arrangements affecting employees pending determination of union’s complaint or expiration of “freeze”, whichever first occurs

BEFORE: R. O. MacDowell, Vice-Chair, and Board Members R. M. Sloan and E. G. Theobald.

APPEARANCES: David Matheson, Jeff Andrew and Ab Player for the applicant; David R. Nash for G. Hanlon Holdings Inc. and G. J. Hanlon; no one appearing on behalf of 947465 Ontario Ltd., c.o.b. as Checker Limousine and Airport Service.

DECISION OF THE BOARD; August 10, 1994

1. This is an application under section 92.1 of the *Labour Relations Act* (the “Act”), which came on for hearing before the Board on August 8, 1994.

2. The union’s principle concern is a change in drivers’ working conditions, implemented by Hanlon on August 1, 1994, but without any input from or discussion with the union. The union asserts that these changes contravene section 81(1) of the Act, and if not rescinded will totally undercut the purpose of this “statutory freeze”. Section 81(1) reads as follows:

81.(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

3. We note that no one appeared on behalf of 947465 Ontario Ltd., c.o.b. as Checker Limousine and Airport Service et Al (“Checker”).

4. After reviewing the material filed and receiving the parties' representations, the Board made the following brief oral ruling:

We have considered the parties' representations and have already noted the unusual commercial context [the taxi industry] within which the problems before us arise. We have also noted the concession by G. Hanlon Holdings Inc. and G. J. Hanlon ("Hanlon") that they are engaged with Checker in related activities or businesses under common control or direction - indeed Hanlon does not oppose a related employer declaration under section 1(4) of the Act.

In all the circumstances we are satisfied that the most appropriate labour relations result and the one most consistent with the purpose of the statutory freeze [section 81 of the Act] is to direct that Hanlon return the situation to what it was prior to August 1, 1994 that is, that Hanlon rescind or suspend the operation of the new arrangements affecting employees put into place on that date. These new arrangements may well be beneficial to employees or some of them, and thus desirable from their point of view. However, given the scheme of the Act and the purpose of the statutory freeze, it appears to us that changes of this kind are to be addressed at bargaining, beginning on Friday when a meeting is scheduled for that purpose.

This interim direction will be operative until the main proceeding is finally disposed of or until the freeze expires, whichever first occurs.

Checker is hereby directed to meet with the union forthwith and bargain in good faith with respect to the terms and conditions of its drivers - including those drivers operating within Checker's system using cars/plates controlled by Hanlon.

5. Board Files 1574-94-U and 1577-94-U are hereby set down for hearing before the Board, beginning on Tuesday, August 16, 1994, and continuing from day to day thereafter. The hearing will place in the Board room at 400 University Avenue on the 6th Floor beginning at 9:30 a.m.

2017-93-R Sheet Metal Workers' International Association, Local 30, Applicant v. Duffy Mechanical Contractors Limited, DuraSystems Barriers Inc., Responding Parties

Construction Industry - Related Employer - Board finding that statutory preconditions established by section 1(4) of the Act met - Fact that only a portion of related employer's work would potentially fall under ICI agreement not a factor causing Board to exercise discretion against making single employer declaration - Board unable to determine, based on evidence and argument before it, whether ICI agreement applying to work performed in related employer's shop - Board applying *Metroland Printing* case - Board issuing related employer declaration in order to preserve applicant union's ability to claim work and ensure that, if disputed, the issue will be dealt with by Board of Arbitration

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *F. B. Reaume* and *R. Weiss*.

APPEARANCES: *J. Raso*, *James Moffat* and *Al Budway* for the applicant; *Bruce Binning*, *William Duffy* and *Michael McClure* for the responding parties.

DECISION OF THE BOARD; August 30, 1994

1. This is an application under section 1(4) of the *Labour Relations Act* (the “Act”) in which the applicant seeks a declaration that Duffy Mechanical Contractors Limited (“Duffy Mechanical”) and DuraSystems Barriers Inc. (“DuraSystems”) are one employer for the purposes of the Act. Duffy Mechanical signed a voluntary recognition agreement with the applicant on April 27, 1989 and is bound to the province-wide collective agreement between the Ontario Sheet Metal and Air Handling Group and the Sheet Metal Workers’ International Association and the Ontario Sheet Metal Workers’ Conference (the “ICI agreement”). The effect of the Board declaring Duffy Mechanical and DuraSystems to be one employer for the purposes of the Act would be to bind DuraSystems to the ICI agreement.

2. The majority of Duffy Mechanical’s business involves the fabrication of ductwork using traditional materials such as sheet metal and the installation thereof on ICI projects. DuraSystems fabricates a variety of products, including ducts, out of a material known as durasteel, but does no installation work.

Preliminary Issue

3. This hearing began before a differently constituted panel of the Board, chaired by Vice-Chair Stamp (the “Stamp panel”). The Stamp panel considered a preliminary issue raised by counsel for the responding parties, as to whether the ICI agreement covers Duffy Mechanical’s shop fabrication. If, it was asserted, the ICI agreement does not apply to shop fabrication, then a declaration that Duffy Mechanical and DuraSystems are one employer for the purposes of the Act should not issue, as it would serve no labour relations purpose since DuraSystems is only engaged in fabrication. For the purposes of argument on this preliminary issue facts were stipulated before the Stamp panel, to the effect that, *inter alia*, Duffy Mechanical has applied the ICI agreement “to employees as defined in that agreement to the shop”.

4. By decision dated June 13, 1994 the Stamp panel ruled as follows:

15. ... If the work performed in the shop, whether on site or off-site, falls within the ICI sector of the construction industry then the ICI agreement applies. If the work performed is not ICI construction work the fact that ICI terms and conditions have been applied by the employer does not expand the scope of the provincial ICI agreement.

5. The matter was then relisted for continuation of the hearing. It continued, before the instant panel, on June 14, 15, 16, and 27, 1994. At the commencement of the hearing counsel for the responding parties indicated that he wished to argue that the ICI agreement does not apply to Duffy Mechanical’s shop. Counsel for the applicant objected to the Board entertaining the issue on the basis that it was an attempt to relitigate the very issue decided by the Stamp panel.

6. As set out above, the Stamp panel ruled that Duffy Mechanical’s shop was covered by the ICI agreement if the work performed falls within the ICI sector of the construction industry. Accordingly, the Board ruled that it would hear submissions and evidence from the parties as to whether the work performed in the shop of either Duffy Mechanical and/or DuraSystems falls within the ICI sector of the construction industry. Following the Board’s ruling, counsel for the responding parties took the position that he would proceed with the merits of the section 1(4) application but maintained the position that the work performed in Duffy Mechanical and DuraSystems’ shops is not covered by the ICI agreement. Counsel for the applicant did not object. Accordingly, the parties litigated the issue of whether a declaration under section 1(4) ought to be made while deferring determination of whether the ICI agreement applies to the shop of Duffy Mechanical and/or DuraSystems to the application under section 126 of the Act.

The Merits

7. Duffy Mechanical was incorporated on April 6, 1973. It is wholly owned by Wm. Duffy Holdings Ltd. ("Holdings"). The sole shareholder of Holdings is William Duffy. Duffy is the sole director, President and Secretary-Treasurer of Duffy Mechanical. Duffy Mechanical is operated and controlled by Duffy.

8. Ninety to 95 percent of the fabrication work done by Duffy Mechanical is ductwork for the ventilation portion of projects within the ICI sector of the construction industry. Duffy Mechanical always installs what it fabricates and does not act as a supplier of fabricated ductwork to other contractors for installation.

9. Approximately eight to ten years ago, while working on the Canary Wharf project in the United Kingdom, Duffy was introduced to a product called "durasteel". The patent for durasteel is held by a company located in the United Kingdom by the name of Cape Durasteel.

10. Durasteel is a fire resistant material consisting of a fibre-reinforced cementitious core sandwiched between and mechanically bonded to galvanized or stainless steel facing sheets. A sheet of durasteel is only 9.5 mm in thickness. Durasteel can be used to fabricate a variety of products including doors and hatches, heat shields, fire stops, barriers, wall and ceiling systems and ducts. In addition to being fire resistant, durasteel is impact and moisture resistant. When used to fabricate a duct, durasteel replaces the sheet metal used in traditional ductwork and provides fire resistance such that a drywall enclosure is not required. Ductwork fabricated out of durasteel can thus be used in areas where there is insufficient space for the traditional system of sheet metal enclosed in drywall. The cost of durasteel to a manufacturer is 15 to 20 times the cost of sheet metal.

11. Duffy believed that there was a market for durasteel in North America and was able to negotiate a deal with Cape Durasteel whereby he acquired the exclusive North American rights to fabricate and distribute durasteel.

12. Duffy is not an expert in fire protection and did not feel that Duffy Mechanical had the capacity to market durasteel. Duffy was introduced to Michael McClure as an expert in passive fire protection and someone who might be interested in developing and marketing the product.

13. Duffy and McClure had discussions in 1990. McClure went to the United Kingdom to investigate the viability of Cape Durasteel and the viability of durasteel as it relates to the North American market. When he returned, Duffy and McClure agreed to proceed with the formation of a fire barrier business. It was agreed that Duffy would provide the necessary financial resources and McClure would operate the company.

14. DuraSystems was incorporated in November 1990. McClure is a director and the President. Duffy is a director as well as Chairman and Secretary. Helen Duffy, William Duffy's wife, is a director and the Treasurer. Pursuant to an agreement entered into by Duffy and McClure, 100 percent of the shares of DuraSystems were initially held by a trust set up for Duffy's son. Duffy, however, holds the class A shares and thus votes the shares held by his son's trust. After the first year of operations McClure acquired 10 percent of the shares of DuraSystems. Each year thereafter he received, and will continue to receive, a further five percent of the shares to a maximum of 49 percent. As of the hearing date, McClure held 20 percent of the shares. The eventual share distribution will have McClure holding 49 percent and Duffy's son's trust 51 percent of the shares of DuraSystems.

15. McClure selected DuraSystems' name and was responsible for the design of its logo. DuraSystems acquired its own phone and fax number. DuraSystems' office, which initially consisted of one desk, is located within the office of Duffy Mechanical.

16. McClure's first responsibility following the incorporation of DuraSystems was to obtain approval of durasteel from the Underwriters' Laboratories of Canada ("ULC"). DuraSystems incurred expense in the development of a new standard for durasteel as well as the testing procedures themselves. After months of work, ULC approval was obtained.

17. DuraSystems began fabricating in 1991 out of 129 Ashwarren Road. These premises were leased from Holdings and located across a parking lot from Duffy Mechanical's shop at 30 St. Regis Crescent North. The lease provides that Duffy Mechanical will make its overhead crane, tow truck, shear, power brake and punch available to DuraSystems on a reasonable basis. In April, 1993, due to a downturn in business, Duffy Mechanical found it no longer required much of the space allocated to its shop at 30 St. Regis Crescent North. DuraSystems moved from 129 Ashwarren Road into 30 St. Regis Crescent North. The premises are leased by DuraSystems from Holdings on the same terms as were the 129 Ashwarren Road premises. Duffy Mechanical and DuraSystems' shops are presently both located in 30 St. Regis Crescent North. They are separated by a storage rack. 129 Ashwarren Road is leased to a third party.

18. All of DuraSystems' sales are supply only. They do not install. DuraSystems does, however, check to ensure that their product is properly installed and answer any questions which may arise in this regard. DuraSystems is consulted by and provides advice to architects and engineers at the design stage of a project.

19. Only one employee of DuraSystems was formerly employed by Duffy Mechanical. In late 1991, Duffy advised Duffy Mechanical's Production Manager, Paul Wells, that he, or the company, would have to find him another job as a result of a downturn in business and the return of a more senior employee from the United Kingdom. McClure was aware of Wells' work habits and offered him a position as the Production Manager for DuraSystems. McClure was not aware that Wells was a certified journeyman sheet metal worker when he hired him. Wells was, however, hired for his expertise in computers including his knowledge of a computer program used to plan cuttings in order to reduce waste. It was these same computer skills that got Wells the position of Production Manager with Duffy Mechanical. There is no interchange of employees between Duffy Mechanical and DuraSystems.

20. In addition to the equipment specified in the lease, DuraSystems uses a computer belonging to Duffy Mechanical. Duffy Mechanical uses DuraSystems' photocopier.

21. Duffy Mechanical and DuraSystems use the services of the same accountant and the same law firm. Either McClure or Duffy's signature is required on cheques. Any contracts or documents which must be executed by DuraSystems must be signed by Duffy and either McClure or Helen Duffy.

22. McClure is responsible for the day to day operations of DuraSystems. Duffy has extensive knowledge about all aspects of DuraSystems' operations including how DuraSystems' employees were hired, the training they received, the skills they require and the likely economic impact of imposing the ICI agreement on DuraSystems. Duffy testified that if DuraSystems had a need for additional funding he would be "involved very quickly".

23. DuraSystems imports sheets of durasteel from the United Kingdom. It then fabricates

these sheets into various products. During the period July, 1992 to July, 1993 DuraSystems' sales were as follows:

Export sales	- 32%
Doors, fire rated rooms, enclosures, heatshields	- 22%
Electrical fire protection and miscellaneous	- 8%
Ductwork	- 38%

24. The employees of DuraSystems who fabricate durasteel into various products were hired "off the street". When fabricating ductwork these individuals use a shearer, jigsaw or carbide tip skill saw in order to cut the sheets of durasteel down to the required size. The sheets are then bolted onto frames to form the ducts. Joints are sealed with a silicone sealant. These individuals may also be required to use welding equipment, screw guns, caulking guns, a metal punch and grinder. Due to the high cost of durasteel, minimizing waste is a high priority.

25. All of the skills utilized by DuraSystems' employees to fabricate durasteel are skills acquired by sheet metal workers during the course of their apprenticeship program. Likewise, sheet metal workers are trained in the use of all of the equipment and tools utilized in the fabrication of durasteel. The fabrication drawings for a unit of durasteel duct are the same as those prepared for traditional sheet metal duct. DuraSystems' employees do not work from these drawings. They work from a cutting list. Sheet metal workers utilize the same skills to fabricate traditional ductwork as are utilized by DuraSystems' employees to fabricate ducts out of durasteel. Sheet metal workers fabricate ducts out of a variety of materials including metal, fibre glass and plastic. Ductwork fabricated from durasteel is installed on ICI projects by sheet metal workers.

26. The vast majority of durasteel duct is purchased by competitors of Duffy Mechanical. Durasteel is included with the sheet metal portion of a contract and accordingly sheet metal contractors who wish to bid on a job must contact DuraSystems for a quote on the durasteel portion of the job. Duffy Mechanical often bids on these jobs and, in the same fashion as the other sheet metal contractors, will contact DuraSystems for a quote on the durasteel portion of the job. One of the reasons for establishing DuraSystems as a separate entity from Duffy Mechanical was to diminish the possibility that sheet metal contractors would view DuraSystems as a competitor. In the course of providing quotes, DuraSystems may obtain confidential information concerning competitors of Duffy Mechanical. It is important to the future success of DuraSystems that sheet metal contractors are confident that this information will not be shared with Duffy Mechanical.

27. There are three conditions which must be met before the Board will declare two or more entities to be one employer for the purpose of the Act:

1. there must be more than one entity;
2. they must be associated or related; and
3. they must be under common control or direction.

28. In the present case it is not disputed that Duffy Mechanical and DuraSystems are two separate entities and we so find. The responding parties dispute, however, that Duffy Mechanical and DuraSystems are associated or related or under common control or direction.

29. The Board discussed the meaning of "control" or "direction" of a company for the purposes of section 1(4) in *Jen-Ry Utility Contracting Company Limited*, [1984] OLRB Rep. Dec. 1724 as follows:

16. All of these cases make it clear that the test for “control” under section 1(4) of this Act envisions the ultimate power to “call the shots” where necessary, as counsel for the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a “related employer” for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example say “yes” or “no” to a wage proposal from the union for both entities. Such power, as the Board cases show, may come simply from the legal relationship between the two entities, (e.g., *Great Atlantic & Pacific Company Limited, A & P Drug Mart Limited*, [1981] OLRB Rep. March 285) or from a total lack of independence in practical or economic terms (e.g. *J. H. Normick, Foley, supra*, and even *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945,), or it may come from a combination of the two, (*Kennedy Lodge, supra, Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214.)

The Board looks to determine where the ultimate power to make decisions concerning labour relations resides and not simply the power to direct the employees’ activities.

30. In the case before us, we note that Duffy’s signature is required on all contracts, he votes the majority of the shares of DuraSystems, DuraSystems is financed entirely with his money, he has detailed knowledge of DuraSystems’ labour issues and he would be immediately and intimately involved in any decisions involving a requirement for additional funding. We are satisfied that the ultimate power to make decisions concerning the labour relations of both Duffy Mechanical and DuraSystems resides in William Duffy and that they are under common control or direction.

31. With respect to whether DuraSystems and Duffy Mechanical are associated or related, it is argued that the products and means of operation of the responding parties are entirely different such that they are not associated or related. It is submitted that Duffy Mechanical is engaged in the fabrication and installation of ductwork whereas DuraSystems is in the fire protection business. The applicant argues that both DuraSystems and Duffy Mechanical are engaged, to some extent, in the fabrication of ductwork and are thus associated or related for the purposes of section 1(4).

32. The fact that the entities in issue are primarily involved in different concerns and activities does not preclude a finding by the Board that they are associated or related. Provided there is an associated or related activity carried on, even if the majority of the activities of the entities concerned are different, the entities can constitute one employer for the purposes of the related activity. In this respect, the Board agrees with the following comments from *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature (“associated” or “related”, “activities” or “businesses”), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer’s main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine, Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are “unrelated” - particularly if they are being undertaken at the same time and involve common managerial or employee skills....

33. The majority of Duffy Mechanical’s fabrication business involves the fabrication of

ductwork out of traditional materials such as sheet metal, for installation on ICI projects. Approximately 38 percent of DuraSystems' business involves the fabrication of ductwork out of durasteel for installation on ICI projects. The skills and equipment utilized by the employees of DuraSystems and Duffy Mechanical are similar. We do not view the fact that DuraSystems' employees work with durasteel and Duffy Mechanical's employees work with more traditional materials to be determinative. They fabricate a similar product (ductwork), using the same skills and equipment, for installation on the same types of projects. Thus, we find that they share a common activity and are "associated" or "related" for the purposes of section 1(4).

34. The remaining issue, and the one on which the parties focused their greatest attention, is whether the Board should exercise its discretion to declare that DuraSystems and Duffy Mechanical be treated as one employer for the purposes of the Act.

35. The thrust of the submissions of counsel for the responding parties is that the Board should not declare Duffy Mechanical and DuraSystems to be one employer because: DuraSystems is an entirely new and different business; DuraSystems is not an attempt to divert business from Duffy Mechanical; a declaration would result in the fragmentation of DuraSystems' work force as, at most, the ICI agreement would cover fabrication for ICI sites; and DuraSystems cannot pay the rates stipulated in the ICI agreement and survive.

36. Where the preconditions established by section 1(4) have been met and the Board is otherwise satisfied that a declaration ought to issue in the factual circumstances at hand, whether an employer can afford the rates in the agreement is not a factor the Board will typically consider in determining whether to make a declaration. In this regard, we adopt the comments made by the Board in *Re Rivard Mechanical*, [1981] OLRB Rep. May 550 as follows:

8. The first point to be commented on, on the above facts, is the extent of the emphasis placed on the respondents on the fact that what occurred here arose solely as a matter of economic survival. While the Board is not insensitive to such problems, it must be stated unequivocally that *The Labour Relations Act* nevertheless does not contemplate or permit the unilateral withdrawal by one party from its obligations under the Act, or the achievement of this end simply by choosing to carry on the same business in a different form. Indeed, the provisions of section 1(4) in particular were designed to eliminate such action. While the Board is given an important measure of discretion under section 1(4), to exercise that discretion on the basis that an employer party was unable to fulfill its legal obligations on a competitive basis would undermine the scheme of the Act, and the very provisions of section 1(4) itself. Counsel for Rivard Mechanical argues: "There is not [sic] intent to interfere with the union but economic realities require that they must maintain a non-union operation". Clearly nothing is more fundamentally destructive of a union's rights and interests than operating non-union, and "economic realities" simply cannot be used to justify this. While it is obviously to no party's advantage for the employer to be forced out of business, that possibility is a problem which, under the Act, must be dealt with on a bilateral basis. The applicant trade union in this case, for example, has recognized the problem and taken certain steps to accommodate it. Whether these steps are adequate is a matter for the trade union itself to assess, and for time to ultimately judge.

37. In the Board's view the fact that only a portion of DuraSystems' work would potentially fall under the ICI agreement is not a factor which would cause us to refuse to declare the responding parties to be one employer for the purposes of the Act. Fabrication shops can have different agreements or terms apply to different fabrication work depending on the end use of the product. Indeed, that may be the effect of the Stamp panel's decision for the shop operated by Duffy Mechanical. Had Duffy Mechanical chosen to perform this work itself the same problem would have arisen and would not have been a basis for not applying the ICI agreement to the work in question. A different result is not warranted simply because DuraSystems was created to do the work instead.

38. We do not conclude that DuraSystems was set up in order to divert business from Duffy Mechanical. However, this conclusion does not warrant a dismissal of the application. The application of section 1(4) does not require a finding of anti-union animus. Its application is primarily to *bona fide* business transactions which undermine established statutory rights (see: *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 at para. 12).

39. Turning to the submission that a declaration should not be made because DuraSystems is a new and different business, this submission must be considered in the context of the purpose of section 1(4). A primary purpose of section 1(4) of the Act is to protect a trade union's existing bargaining rights from being eroded by the transfer of work to employees of a related employer. The Board addresses that purpose in the following terms in its decision in *Joe Franze Concrete Ltd.*, [1984] OLRB Rep. April 631:

7. Section 1(4) is most often utilized by this Board to preserve bargaining rights. In the typical case, an employer whose work force is represented by a trade union sets up a new corporate entity to engage in the type of work that was previously done according to the terms of a collective agreement. New business is then diverted to the unorganized enterprise, and there is a consequent reduction in the number of employees working under the collective agreement. The union soon learns of the employer's new venture and initiates legal proceedings. This is a clear example of the evil that section 1(4) was designed to remedy, and the Board has invoked this provision to ward off such a threat to bargaining rights. Since the non-union company is freshly established, it does not have an established work force of unorganized employees whose opposition to trade unionism must be weighed in the balance.

8. An erosion of bargaining rights is clearly established when the creation of a non-union firm causes a drop in the number of employees working for an organized enterprise. But any causal relationship is not always easily demonstrated. Even when the volume of business done by the unorganized venture grows, as the business activity of the other falls off, the circumstances may be such that one cannot determine with certainty what impact the non-union company has had on its commercial sibling. In other words, there may be no way of ascertaining whether, but for the existence of the unorganized firm, its customers would have dealt with the union company or with other non-union enterprises.

9. The potential for a loss of union jobs to a non-union company is clearest when the number of organized employees actually falls. But the right of a bargaining agent to represent employees can be undermined in a less obvious way. Consider a business that is expanding rapidly. If the existing firm hires employees to staff this expansion, they would be represented by the union, assuming that they fall within the confines of the bargaining unit. Instead of following this course, management decides to channel this growth into a new, unorganized venture, so that the level of employment at the parent enterprise remains unchanged. Once again the union's bargaining rights are potentially undercut, but this time the impact is felt by those seeking union jobs in the future, rather than persons already employed under a collective agreement. The detriment to prospective employees is particularly troublesome in industries like construction where most union members are continually moving from one employer to another.

10. At the other end of the spectrum lie commercial arrangements that pose no threat to a subsisting collective bargaining relationship. In *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914, the union represented the work force of a company carrying on business as a general contractor; a second, unorganized company manufactured mobile building units. The Board found that the collective agreement applied only to construction, not to manufacturing. As the union was not entitled to represent employees engaged in manufacturing, the establishment of the new company did not jeopardize existing bargaining rights. By refusing to treat the two companies as one employer, the Board recognized the right of the unorganized manufacturing employees to decide whether or not to engage in collective bargaining.

40. The fact that an employer starts up a new company to perform new and different work from that performed by the existing company is not determinative. Once satisfied that the three preconditions set out in section 1(4) have been met, the Board considers whether, but for the work

being done by the second company, it would otherwise have been done by the employees in the bargaining unit, or whether there exists the meaningful potential for erosion. The Board has declined to grant a related employer declaration where the work in question did not fall within the defined scope of existing bargaining rights on the basis that such a declaration is of extremely limited utility (see: *Dominion Stores Limited*, [1979] OLRB Rep. June 506 and *Valdi Inc.*, [1979] OLRB Rep. Aug. 833).

41. Counsel for the applicant argues that the fabrication of durasteel duct by DuraSystems is an erosion of its bargaining rights as, if DuraSystems was not fabricating ductwork, the various sheetmetal contractors who purchase durasteel ductwork would be fabricating greater quantities of ductwork made out of traditional materials and that such work would accrue to its members under the ICI agreement. If the applicant's theory of erosion is correct any new technology which had the effect of reducing the amount of work accruing to a trade would constitute erosion. In our view, such erosion of the applicant's bargaining rights is not relevant to our determination.

42. Based on the purpose of section 1(4) as articulated by the Board in *Joe Franze, supra*, the Board is of the view that whether there has been an erosion of bargaining rights in the instant case depends on whether, had this work been undertaken by Duffy Mechanical, the applicant's bargaining rights would have encompassed employees engaged solely in the fabrication of ductwork out of durasteel. As indicated above, the parties to this proceeding litigated the issue of whether a related employer declaration ought to be made while deferring determination of the issue of whether the ICI agreement applies to the section 126 application.

43. Thus, the present panel, based on the evidence and argument before us, is not in a position to determine whether the ICI agreement applies to work performed in the shop of Durasystems.

44. Should the fact that this panel is unable to conclusively determine that the ICI agreement applies to Duffy Mechanical's shop cause us to decline to issue a related employer declaration? A very similar issue was dealt with by the Board in *Metroland Printing, Publishing & Distributing*, [1991] OLRB Rep. Sept. 1069 as follows:

76. Clearly, there is extremely limited utility to a related employer declaration if the work in question does not fall within the scope of the applicant's bargaining rights. In this context it is understandable that the Board may decline to exercise its discretion in such a case. We should not lose sight, however, of the fact that the determination of what constitutes bargaining unit work is not the primary inquiry in a related employer application. Furthermore, such a determination, as the facts of the present case tend to highlight, may not be as simple and straightforward as the cases just referred to may suggest. That is why the Board may not always finally determine the question of the scope of bargaining rights, which, by its very nature, is one more appropriately determined by a Board of Arbitration in accordance with the relevant collective agreement and the Act.

77. In *Brink's Canada Limited*, [1987] OLRB Rep. May 647 the respondents argued that the Board should not exercise its discretion since the work performed by the employees of the entity sought to be brought within the collective agreement was vastly different from that performed under the agreement and, consequently, only an ancillary portion of the work performed by the affected employees would be captured within the applicant's bargaining rights. The union in that case asserted that the determination of the scope of the applicant's bargaining rights was a matter for arbitration under the agreement:

... The applicant believed, *probably correctly*, that an arbitrator would not deal with the issue of whether ATM was a related employer bound to the Toronto Truck Agreement and, unless ATM could be shown to be bound

to the agreement, the arbitrator would not be able to make any orders with respect to that company.

[at paragraph 31, emphasis added]

The Board ultimately allowed the application but left questions regarding the extent and manner of the application of the collective agreement to the parties (or, if necessary, an arbitrator) to resolve.

78. Section 1(4) is designed to insure the stability of bargaining rights and to prevent the obfuscation of economic and labour relations realities which may (intentionally or not) result from the structure and organization of entities not operating at arm's length. A major decision was made to implement new technology. The persons ultimately responsible for taking that decision could have decided to implement the system in the composing room rather than the News. Had the system been introduced directly into the composing room, the applicant would have been able to claim the resulting work and, if disputed, have the matter determined by arbitration. Although the issue at arbitration might have been more complicated had the system been introduced not in the composing room but elsewhere within the Wolfedale facilities, the result, at least in terms of access to arbitration, would have been similar. Is the applicant to be precluded from making its claim and ultimately having it adjudicated, if necessary, only because the system was introduced into the premises of a related employer? We think not. Were we satisfied that the work performed by marketing assistants bears no relation to that previously done in the composing room, we might have been persuaded to refrain from exercising our discretion.

• • •

81. The applicant has held the bargaining rights in question for nearly a decade. Almost all other newspapers within the Metroland chain had their own composing rooms. Not so the News. Its composing work was performed in the composing room which, although part of the production division, was located in a portion of the building which otherwise houses the News. The News became the composing room's principal client. But the relationship between the two was different from the traditional business-client relationship. The decision to implement new technology at the News was, effectively, a decision to cease the operations of the composing room. Newly hired employees at the News continue to perform functions previously performed in the composing room. In these circumstances we do not believe that the union ought to be entirely precluded from even asserting its claim merely because the system was implemented at the News rather than in the composing room or elsewhere within the production division.

82. Having found that the respondents are carrying on associated or related activities under common control or direction we hereby direct that, for the purposes of the Act and the union's bargaining rights as currently reflected in the composing room collective agreement, they be treated as constituting one employer. We further declare that the News is bound to the composing room collective agreement as if it had been a party thereto.

45. As indicated by the Board in *Metroland*, *supra*, the question of the scope of bargaining rights is more appropriately dealt with by a Board of Arbitration (which, in the construction industry, is virtually without exception, a panel of the Board) in accordance with the relevant collective agreement and the Act. However, a Board of Arbitration is unlikely to deal with the related employer issue and, unless it can be shown that the alleged related employer is bound to the agreement, the Board of Arbitration will be unable to issue an order against that company. The Board's usual procedure when dealing with a section 1(4) application and a section 126 application claiming damages for work performed by the related company is to determine the section 1(4) application first such that, if and when the section 126 application is heard, it has already been established that the related employer is bound by the agreement thereby enabling the Board of Arbitration to issue an order against the related employer. If, in the present case, the Board refused to exercise its discretion to issue a related employer declaration because the scope of the applicant's bargaining rights has not yet been determined, the applicant may very well be precluded from making its claim to the work performed in the shop of DuraSystems and having such claim adjudicated. Had

the work in question been introduced into the shop of Duffy Mechanical the applicant would have been able to claim the work and, if disputed, have that claim determined by arbitration. We are satisfied that a related employer declaration should issue in order to preserve the applicant's ability to claim the work and ensure that, if disputed, the issue will be dealt with by a Board of Arbitration.

46. Accordingly, having found that the respondents are carrying on associated or related activities under common control or direction we hereby direct that, for the purposes of the Act and the applicant's bargaining rights as currently reflected in the ICI agreement, they are to be treated as constituting one employer. We further declare that DuraSystems is bound to the ICI agreement as if it had been a party thereto.

47. The parties are to advise the Registrar within 30 days of the date of this decision as to whether the Registrar is to list Board File 2016-93-G for hearing and, if so, the issues to be adjudicated and the number of hearing days required.

48. This panel of the Board is seized of Board File 2016-93-G.

0933-94-OH Maria Raposo, Applicant v. Hurley Corporation, Responding Party

Discharge - Health and Safety - Applicant employed as office cleaner suffering from thyroid condition - Employer requiring its employees to wear uniform including bow-tie tied around neck - Applicant's thyroid condition aggravated by anything around her neck - Employer suspending applicant for wearing bow-tie at third button of her blouse - Board concluding that applicant honestly and reasonably refused to wear item of clothing in manner she believed would endanger her health - *Occupational Health and Safety Act* applying in circumstances where health and safety risk identified by worker is risk to her as a result of disability - Employer directed to reinstate applicant to former position with full compensation and to permit applicant to wear bow-tie clipped at third button of uniform

BEFORE: *Laura Trachuk*, Vice-Chair.

APPEARANCES: *Daniel Ublansky and Maria Raposo for the applicant; Manny Silva, Manuel Rebolo, Maria Castro and Maria V. DaSilva for the responding party.*

DECISION OF THE BOARD; August 18, 1994

1. This is an application under section 50 of the *Occupational Health and Safety Act* (sometimes referred to in this decision as "the O.H.S.A."), alleging that the applicant (sometimes referred to as "Raposo") was discharged from her employment by the responding party (sometimes referred to as "the company") contrary to sections 25(2)(h), 27(2)(c), 43, 50(1)(a).

2. Those sections of the O.H.S.A. read as follows:

25.-(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

...

- (h) take every precaution reasonable in the circumstances for the protection of a worker.

...

27.-(2) Without limiting the duty imposed by subsection (1), a supervisor shall,

...

- (c) take every precaution reasonable in the circumstances for the protection of a worker.

...

43.-(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

- (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker.
- (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or
- (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of the refusal to the worker's employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his or her work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of the refusal to work or do particular work continues to be likely to endanger himself, herself or another worker.
- (b) the physical condition of the workplace or the part thereof in which he or she works continues to be likely to endanger himself or herself; or
- (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations

and such contravention continues to be likely to endanger himself, herself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the workplace or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his or her decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his or her work station during the worker's normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 50, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the workplace or in the part of the workplace being investigated unless, in the presence of a person described in subsection (12), the worker has been advised of the other worker's refusal and of his or her reasons for the refusal.

(12) The person referred to in subsection (11) must be,

- (a) a committee member who represents workers and, if possible, who is a certified member;
- (b) a health and safety representative; or
- (c) a worker who because of his or her knowledge, experience and training is selected by the trade union that represents the worker or, if there is no trade union, by the workers to represent them.

(13) A person shall be deemed to be at work and the person's employer shall pay him or her at the regular or premium rate, as may be proper,

- (a) for the time spent by the person carrying out the duties under subsections (4) and (7) of a person mentioned in clause (4)(a), (b) or (c); and
- (b) for time spent by the person carrying out the duties under subsection (11) of a person described in subsection (12).

...

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or

- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 104, 105, 108, 110 and 111 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Despite subsection (2), a person who is subject to a rule or code of discipline under the *Police Services Act* shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

3. At the conclusion of the hearing into this matter the Board made the following oral ruling:

I have carefully considered the evidence and arguments presented by the parties. The applicant claims that she is unable to wear her uniform blouse and bow-tie done up to the neck because of a thyroid condition. She has presented two doctor's notes to that effect to the responding party employer.

The responding party was willing to allow her to undo her top button and attach the bow-tie to the second button. The applicant claims that she needs to undo the top two buttons and has therefore been wearing the bow-tie at the third button. The applicant refused to do up the second button and wear the tie there as it would exacerbate her condition. As a result she has been suspended on three occasions, most recently for an indefinite period.

The Board finds that the responding party has suspended the applicant contrary to section 50(1) of the *Occupational Health and Safety Act*. The applicant is entitled to rely upon the protection of that Act and not have to work in a manner or to use any equipment including items of clothing in a manner that will endanger her health. It was reasonable for her to refuse to do up and clip the tie to the second button and to clip it at the third button instead.

Accordingly the Board:

- 1) declares that the responding party has contravened the *Occupational Health and Safety Act*;
- 2) orders the responding party to reinstate the applicant, Maria Raposo, to her former position with full compensation for any lost wages and benefits;
- 3) orders the responding party to permit the applicant, Maria Raposo, to wear her uniform with the top two buttons undone and to wear her bow-tie clipped right above the third button as demonstrated by her in her evidence was her practice.

The Board will remain seized to deal with any issues arising with respect to damages.

Written reasons were requested by counsel for the applicant and are here provided.

4. The resident manager, Maria DaSilva, the area manager, Manuel Rebolo, the workplace health and safety representative, Maria Castro and the Manager of Human Resources, Manny Silva who also presented the case, testified for the company. Maria Raposo testified on her own behalf. She presented her evidence through an interpreter who also assisted the other witnesses at various points in their testimony.

5. Few of the relevant facts in this matter are in dispute. The company provides cleaning services to office buildings in downtown Toronto. The applicant works at the Sun Life building.

6. The applicant suffers from a thyroid condition which is aggravated by anything around her neck. The uniform for the company's employees at the Sun Life building includes a blouse and a bow-tie tied around the neck.

7. There was a dispute as to whether Raposo had ever worn the bow-tie, but certainly by May of this year she was not wearing it. On or about May 20, she was suspended for not wearing the tie. She then provided a doctor's note which explained her medical problem and recommended that she not wear anything tight around her neck.

8. It does not appear that the company ever really questioned Raposo's medical problem. Certainly it indicated at the hearing that it was not questioning it. The only independent investigation conducted by the company was through the Manager of Human Resources, Manny Silva, who discussed the matter with his own doctor. Mr. Silva testified that his doctor confirmed that a thyroid problem would be aggravated by something tight around the neck but would not be bothered by "something loose". Later Raposo submitted a further doctor's note which advised that she should not be wearing a bow-tie.

9. The company left Raposo in the position of choosing to either wear the bow-tie or not return to work. She therefore did not return to work right away. The company finally advised her that she had the choice of being provided with a larger blouse to which she could clip the tie or be transferred to another building where a bow-tie was not required but where she would receive less pay.

10. Raposo chose the option of clipping the tie to a larger blouse and returned to work. However, she was suspended on two further occasions, the final one indefinitely because, the company claimed, she would not wear the bow-tie.

11. However, Raposo's supervisor DaSilva testified that Raposo did wear the tie but that she wore it somewhere from upper to mid-abdomen. Maria Castro, the health and safety represen-

tative, indicated in her testimony that Raposo wore her tie somewhere between her breasts. The area manager, Manuel Rebolo, testified originally that Raposo was wearing the bow-tie somewhere between upper and mid-abdomen. However, he then advised that she was wearing it at the "third button". When a blouse was finally produced he confirmed that her tie was being worn at the third button.

12. Raposo demonstrated to the Board how she had been wearing the blouse and tie. She confirmed that she had been wearing the tie at the third button. She explained that she needed the shirt undone to the third button because having it done up any tighter aggravated her condition. The Board finds that the applicant wore her tie immediately above the third button as indicated by Rebolo and demonstrated in Raposo's own evidence. This arrangement in the Board's observation, while perhaps less "tidy" than having all of the buttons done up is certainly perfectly modest.

13. Thus, although the company's disciplinary memos indicate that Raposo was being suspended for not wearing her bow-tie, in fact, she was being suspended for wearing her bow-tie at the third instead of the second button.

14. Another employee of the company also had a disability which prevented her from wearing the bow-tie. She was allowed to continue working at the Sun Life building without one.

15. As noted above, the workplace health and safety representative testified. She stated that she had been appointed to that position by the company in February and had been elected to it at the end of June. It was apparent from her testimony that she had little idea what rights, obligations and protections are contained in the *Occupational Health and Safety Act*. She seemed to be unaware of both the right of employees to refuse work they consider to be unsafe, as well as of the procedures that are to follow such a refusal. She was not present at any of the meetings the company had with Raposo about the bow-tie.

16. The applicant pleaded that she had been discharged. The responding party denied that she had been discharged and claimed that she had been suspended with the choice of either returning to work and wearing her blouse and tie as specified or being dismissed. The Board finds that the company's characterization is more accurate but that makes little difference to the applicant if she is not permitted to return to work without wearing the tie and blouse in the manner that would exacerbate her illness.

17. The company argued that it had tried to accommodate Raposo's disability and that she was just being defiant in not wearing her tie exactly as directed. The company also indicated that it was willing to take her back if she would wear the tie at the second button.

18. It was the applicant's position that she had been discharged for attempting to enforce the Act. Counsel argued that wearing the tie at the third button and the fact that Raposo stayed off work rather than wear the tie as directed amounted to a work refusal even though the appropriate statutory procedures were not followed. He asserted that the company had an obligation to provide Raposo with alternate work until the work refusal procedures in the Act had been exhausted. The Board was referred to what counsel called the "susceptible worker policy" contained in the Operations Manual used by the Occupational Health and Safety Branch and to a decision of the New Brunswick Court of Queen's Bench, *McLean v. Humpty Dumpty Foods Ltd.* (February 3, 1994, unreported).

Decision

19. The applicant refused to wear an item of clothing provided by the company in a manner

that she reasonably believed was unsafe for her. There is no difference in principle between this situation and one in which a worker refuses to wear footwear or head gear in a manner that he or she perceives to be unsafe. Whether or not this situation is characterized as a work refusal, by refusing to comply with directions from the company which she believed would endanger her health she was attempting to enforce the *Occupational Health and Safety Act*. A worker need not name the O.H.S.A. in order to claim its protection, including its protection from reprisals provided she is motivated by health and safety concerns and identifies those concerns. (See *Whitler Industries Limited*, [1991] OLRB Rep. May, 718; *Village Pool and Spa*, [1990] OLRB Rep. Sept. 987; *Boston Insulated Wire and Cable Co.*, [1990] OLRB Rep. Dec. 1235, *Bill's Country Meats*, [19984] OLRB Rep. Nov. 1549, *Frankel Steel Ltd.*, [1985] OLRB Rep. Aug. 1210.)

20. It does not matter in these circumstances that the health and safety risk identified by the worker is a risk to her as a result of a disability. All workers are protected under O.H.S.A. and cannot be subject to reprisals for refusing to work in a manner which they honestly and reasonably believe is unsafe for them. As noted above, section 43(3) states that "A worker may refuse to work or do particular work where he or she has reason to believe that any ... thing the worker is to use or operate is likely to endanger himself, *herself* or another worker".

21. The applicant honestly and reasonably refused to wear an item of clothing in a manner that she believed would endanger her health. This was an attempt to enforce the O.H.S.A. As a result, she was suspended on a number of occasions. She was therefore subject to reprisals contrary to section 50(1) of the O.H.S.A. For these reasons the Board made the orders listed in paragraph 3. The Board is empowered to make such orders under section 91(4) of the *Labour Relations Act* referred to in section 50(3) of the O.H.S.A. Although not expressly referred to in the oral ruling, I hereby direct that the applicant's record be cleansed of any and all documentation relating to this matter.

22. It is somewhat surprising that the Board would be required to hold a hearing with respect to a dispute which is essentially about whether or not a worker with an acknowledged medical condition involving her neck should wear her bow-tie at her second or third button. Such a dispute poses the danger of trivializing the important rights and obligations contained in the O.H.S.A. as well as the Board's role in adjudicating certain disputes under that Act. The Board urged the parties to resolve this matter between themselves but they were unable to do so. It is the Board's view that this is a matter which should have been resolved without the necessity of its intervention. Nevertheless, it is the Board's responsibility to adjudicate a dispute arising under section 50(1) provided that a *prima facie* case is made out. Certainly in this case, while the real issue between the parties may have been trivial, the consequences were potentially serious for the applicant.

0412-94-U; 0718-94-U George Lee, Applicant v. Local 75, Union Representative Cledwyn Longe, Responding Party

Discharge - Duty of Fair Representation - Unfair Labour Practice - Employee complaining about union's failure to advance his grievance to arbitration - Board noting that employee's complaint premature and that fact that a grievance does not go to arbitration does not, in itself, establish any arguable breach of the Act - Board exercising its discretion not to inquire into complaint - Complaint dismissed

BEFORE: *R. O. MacDowell*, Vice-Chair.

DECISION OF THE BOARD; August 12, 1994

1. Board File No. 0412-94-U (filed May 5, 1994) and Board File No. 0718-94-U (filed May 30, 1994) are hereby consolidated.

2. These are applications under section 91 of the *Labour Relations Act*, alleging that the respondent trade union has contravened or may contravene section 69 of the Act. Section 69 reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. Mr. Lee claims that his employer, the Chelsea Inn, has improperly removed him from the seniority list. In his May 5 complaint, he contends that the union will not accept a grievance on his behalf. In his May 30 complaint he contends that the union is not taking his grievance to arbitration. However, despite Mr. Lee's assertions, it does not appear that there has been any concrete of final determination *not* to go to arbitration; moreover, it is not clear that there could be until the grievance procedure has been exhausted.

3. Section 69 requires a trade union to act fairly, (among other things), in the handling of employee grievances. But section 69 does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance and the likelihood of its success - that is, whether the facts upon which the employer relies can be successfully rebutted, whether the employer's actions clearly establish a breach of the collective agreement, and so on. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and may have ramifications beyond the individual case, a trade union is not only *entitled* to settle grievances, *in many cases it should do so*. In *Catherine Syme*, [1983] OLRB Rep. May 775, the Board described the situation this way:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits

of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interest of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

4. The fact that a grievance does not go to arbitration does not, in itself, establish any arguable breach of the *Labour Relations Act*. That is an every day occurrence in the labour relations world. Indeed, if the grievance procedure is working properly, one would expect that cases would be resolved - either by the employer recognizing that it has made a mistake, or the union recognizing that the employer was right, or the union recognizing that whether the employer was right or wrong, its actions can not be successfully challenged at arbitration.

5. I repeat, it is perfectly normal for cases not to proceed to arbitration; and, against that background, it is difficult to conclude that an employee makes out an arguable case of a breach of section 69 merely by stating that fact.

6. However, quite apart from whether the complaints make out an arguable case, it appears to me that they are premature. From the material before me, it appears that Mr. Lee's grievance is still in the grievance procedure and no final determination has yet been made about whether it will or will not proceed to arbitration. Accordingly, at this point, there does not appear to be any purpose to be served by formal litigation.

7. For the foregoing reasons, and in the exercise of the Board's discretion under the Rules and section 91(1) of the Act, these two applications are dismissed.

8. Such dismissal is, however, without prejudice to the applicant's right to file a new application in a timely way. However, should the applicant file a new application, he must carefully set out all of the facts upon which he relies including: the basis for his claim against the employer; the reasons why, in his submission, the employer has contravened the terms of the collective agreement; the acts or omissions of the union officials that, Mr. Lee asserts, constitutes conduct that is "arbitrary, discriminatory, or in bad faith"; and any documents upon which he relies or to which he will refer in the course of the proceeding. These details are necessary so that the responding parties will understand the allegations that are being made against them, and so that the Board will be able to fairly determine the dimensions of the dispute.

1097-94-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Maidstone Manufacturing Inc., Responding Party

Certification - Employee - Board finding that certain persons attending safety orientation session on date of certification application not employees at work on that date and properly excluded from list of employees

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Stephen Krashinsky, Dan Flynn, Mike Thomas and Wayne Jobin* for the applicant; *E. L. Stringer, D. Spittal, T. McLean, M. Dendekker and John London* for the responding party.

DECISION OF THE BOARD; August 5, 1994

1. This is an application for certification. By decision dated July 25, 1994 the procedure for dealing with certain disputes between the parties concerning the bargaining unit description and the list of employees was set out. Certain of those disputes proceeded to hearing before me. Subsequently, the challenge in respect of Tibor Fabian was referred to a Labour Relations Officer by decision dated July 27, 1994. In addition the parties reached further agreement as set out in a decision dated August 3, 1994.

2. That left for determination the question of whether or not ten persons were employees at work on the date of the certification application. It was the position of the responding party (the "employer" or the "company") that these individuals were properly included on the list of employees. It was the position of the applicant (the "trade union") that they ought properly to be excluded from the list of employees. By decision dated August 3, 1994 the Board concluded that these individuals were not employees on June 24, 1994, the certification application date. They were therefore properly excluded from the list of employees. I now provide reasons for that determination.

3. The evidence concerning these individuals can be summarized as follows. A group of eleven persons were asked by the employer to attend a safety orientation session at the plant on June 24, 1994. Prior to this invitation, the employer had determined that it was in need of additional workers, had reviewed its files, had conducted in-person interviews, including certain linguistic and math testing. Following the interview, these individuals had been asked to attend for a

medical. Following clearance on the medical, the employer contacted each of these individuals by phone to ask them to report for the safety orientation session.

4. The session itself lasted somewhere between five and six hours. It was conducted at the workplace. This employer is engaged in the business of metal stamping. It manufactures various products for the automotive industry. These individuals were all being considered for jobs as press operators. The orientation program was primarily dedicated to safety issues in the plant and more specifically to the safe operation of the presses.

5. Prior to the conclusion of the session, each individual was asked to read and sign three separate forms. These included a "press safety and palm button check compliance" form which confirmed that the person had been instructed in certain safety procedures and that they understood those instructions. The second form confirmed that the individual had received a copy of the company's safety rules and regulations and acknowledged that the individual "understood, and will abide by the rules and regulations set forth by my employer". The third confirmed that the individual had been issued personal protective equipment in the form of arm guards, safety glasses, and ear plugs, and that the individual understood that wearing the protective equipment was necessary in order to comply with company policy.

6. In addition each individual was provided with an employee handbook outlining various company policies with respect to terms and conditions of employment. Included in that handbook is reference to seniority. The handbook provides:

"Your seniority is determined by your last date of hire. *Your date of hire means the date you actually started to work...* When referring to a seniority employee, it means an employee who has satisfactorily completed the probation period".

(emphasis added)

7. The handbook also provided that all employees serve a probationary period of ninety calendar days during which time "the company will decide if the employee is suitable for the work which may be required of him".

8. Near the conclusion of the orientation program, each individual was also provided with a time card and were told to enter their name as they wished to see it on their payroll records. They were provided with a blank TD1 form for income tax purposes and an employee benefit application. These three documents were to be brought in by the employee when they were called into work. They were also shown a production timesheet and how to fill it in.

9. Eleven individuals attended the session on June 24, 1994. At the conclusion of that session Ms. Renaud, the Safety Coordinator who conducted the session, informed Ms. Trudy McLean, the Human Resources Manager, that she had some concerns with respect to one of the participants. Approximately two to two and a half weeks later the other ten individuals were called and informed they were to report to work on specific shifts and all ten did so report and continue to perform work for the employer.

10. It was Ms. Renaud's belief that the individuals who attended the orientation session on June 24, 1994 would not be paid for that time. In her view, however, these individuals were employees in that she was conducting their training. Various witnesses, not surprisingly, had varying characterizations of the status of these individuals, giving rise to this dispute. In the past, the employer had paid individuals for attending the orientation session provided that person also commenced work that same day. However if the individual attended the orientation session only to be called into work sometime later, the employer had not paid for that time in attending the orienta-

tion session, nor had it credited the individual with seniority for that day or credit towards their probationary period. As recently as April 21, 1994, at least with respect to temporary help, all temporary employees were required to go through orientation in order to become a press operator, and their probationary time was to start the day that they were placed on a press. All other time, including the time spent attending orientation, would not be counted.

11. Ms. McLean commenced her employment as Human Resources Manager with the employer in March of 1994. The primary complaint that she faced during her initial period of employment was the perceived lack of equal treatment among employees. She learned that on May 30, one employee who had completed the orientation program and had commenced work immediately had been paid for the time spent in orientation. However other persons attending that same orientation who had not commenced work immediately had not been paid. This gave rise to a concern on her part with respect to the issue of fair treatment of employees. Another orientation session was held in or around June 18, 1994. These individuals were not paid for that time but were subsequently called into work. Following the June 24 orientation session, Ms. McLean spoke with John London, a Vice-President of the employer's parent company, to discuss this perceived lack of fairness. A decision was taken on June 28 or 29, 1994 to pay those persons who had attended the session on June 24. At that time Ms. McLean was aware and had been aware since her arrival at the plant that the applicant was engaged in an organizing campaign. She had heard rumours that the union had filed an application for certification but had not received any notice. She received informal notice through counsel on July 3 and formal notice of the application for certification on July 4, 1994. This application was filed on June 24, 1994. I note that the scheduling of the orientation session was done by Ms. Renaud in order to meet her schedule and was coincidental to the filing of the certification application.

12. The ten employees who were called into work subsequently received five hours pay at the press operator's start rate. The eleventh person who attended the orientation session but who was not called in to work because of the employer's concerns concerning his conduct, did not receive payment for attending the orientation session.

13. In filing the necessary schedules in respect of this application for certification, the employer included the names of those ten individuals who attended the orientation on June 24, 1994 and who had subsequently been called in to work. The eleventh person who had attended but was not called in was not included on the list of employees filed by the employer.

14. We heard evidence from Steve Welch, a press operator who had taken the orientation program on October 1, 1993 and has since been employed by the company as a press operator. He recalled inquiring at the orientation session whether or not, having completed it, he would be guaranteed work. He recalls being informed that while there were no guarantees, the likelihood of being called in following the successful completion of the orientation program was very good. Ms. Renaud could not specifically recall this interchange. She has conducted some seventy of these sessions over a period of the last two years. She was aware that someone attending the orientation session might not necessarily be called into work, although generally they were. Ms. Renaud is not part of management.

15. On June 24, 1994, it is apparent that as a result of concerns raised by Ms. Renaud concerning the eleventh individual's conduct during the orientation session that Ms. McLean determined that he would not be called in. In describing the hiring process, Ms. McLean gave somewhat contradictory answers. Individuals are called and merely asked to attend the orientation session. Applicant's counsel posited that the individuals were not told, to the effect of "congratulations you have been hired". Ms. McLean responded that was correct, they were not so told because they had

not completed the orientation program. Applicant's counsel then asked whether the decision to hire is not finalized until after orientation. Ms. McLean's response was that the individuals were brought in as employees but if the odd time they did not successfully complete the orientation, the decision was taken not to keep them as an employee. At no point during this entire process up to and including when the individual was called into work was the employee ever given either informal or formal confirmation of employment or status. The eleventh person who was not called in following the June 24 orientation was not provided with any record of employment or any notice. He was simply not called. No one seems to have attempted to retrieve the safety equipment issued to him.

16. The issue is whether or not these ten challenged individuals were "*employees in the bargaining unit on the certification application date*" (section 8(1) of the *Labour Relations Act*). The applicant argued that a further issue included whether, in the words of Schedule A required to be filed by the employer, these were "persons employed in the bargaining unit described in the application of the applicant on June 24, 1994 who were *at work* on that date".

17. With respect to the question of whether or not these individuals were "*at work*" on the date of application, I was satisfied that, assuming these individuals were employed at the time, they were engaged in work. Although not actually producing product for the employer, the training was a necessary and integral part of the operation of the employer. While not determinative, that training was conducted on-site and included hands-on work with some of the machinery on which the individuals would ultimately be engaged. It is not at all uncommon that an employee may not be particularly productive in the first day or two of employment while they find their way around the plant, learn where they are to be assigned, and commence operating machinery. The fact that this company provides a more extensive safety component to that orientation at the front end of an individual's relationship with them cannot be construed as anything but work. However, the fact of performing work does not inevitably or necessarily lead to the conclusion that the individual performing the work is an employee of that employer.

18. Therefore, the issue amounted to whether or not these individuals were *employees* on the certification application date. The two primary elements of the union's argument were that you could not retroactively change the employment status of an individual. It must be determined as of June 24. Secondly, as of June 24 these individuals had not been hired, given that the successful completion of the orientation program was a precondition to employment. Therefore attendance at the orientation session was part of a pre-hiring interview process. The responding party argued that even if these individuals had not been paid for the day, its position would be the same; that they were employees of the employer performing work on June 24. It was counsel's assertion that the employer would be unable to put individuals through such a training course for the sole purpose of qualifying them to be able to produce product without a legal obligation to pay them. Counsel argued that the only evidence with respect to the eleventh individual is not that there was a decision not to hire him but rather, a decision not to call him into work following receiving the concerns of the safety coordinator. In that sense that individual did not successfully complete the orientation. The individuals had been treated as employees on June 24 by the employer.

19. In determining whether these individuals were employees, that determination ought properly to be made to reflect employment status as it existed on the certification application date. That is the date on which the Board focuses in order to determine both the number of employees in the bargaining unit and the number of those employees who support or oppose the trade union. To some extent, the rules surrounding these determinations are arbitrary and do not necessarily reflect for example, an individual's commitment (or not) to the workplace, or other factors which inevitably exist as a result of the fact that a workforce is not static. However in order to determine

an application for certification and in order to provide some certainty and guidance to the parties, the Board, over the years, has developed approaches to these issues from which the necessary “moment in time” can be “frozen” and determined. The recent amendments to the Act place even greater focus on the certification application date.

20. This was not a case, in my view, where any great mischief was to be avoided. The union argued that these individuals ought not to be included as the union would not have been aware of them during its organizing campaign and the individuals themselves would effectively be denied any opportunity to express their choice for or against collective bargaining, given the time limitations placed by the legislation. However as the employer correctly noted, the same argument would apply had these individuals clearly been employed and had operated the presses that day. In those circumstances, the union would not have disputed that they were properly on the list. This only reinforces my earlier comments of the somewhat arbitrary nature of the process for determining who is an employee on the certification application date for purposes of consideration in a certification application.

21. In this case, the normal indicia of employment status arguably pointed to either conclusion asserted by the parties. In support of the employer’s position that these individuals were employees on June 24 was the evidence of their agreement to certain policies and procedures of the employer, the issuing of safety equipment to the individuals, the actual hands-on training or work being performed, the subsequent payment for their time spent, and the subsequent recognition of seniority and credit for probation.

22. However, in support of the trade union’s position that these individuals were not yet employed was the evidence of the past practice of the employer not to pay the individuals or accord them seniority or credit towards their probation. That policy continued to exist as of June 24, 1994 and until at least June 28, 1994. Attendance at the orientation session was not a guarantee of work. The eleventh individual who failed to successfully complete the orientation was not subsequently called in to work. That individual was not paid for attending the session on June 24 nor included on Schedule A by the employer as an employee on June 24. The eleventh individual was not provided with any notice of termination or record of employment to indicate that he had been hired and then let go. Nor were any of the individuals who were subsequently called in notified as of June 24 that they had in fact been hired. The employees, although provided with a time card, did not punch in on June 24 as other employees do. Nor did the employer collect the income tax form or benefit application during the orientation session which arguably is more consistent with employment having commenced that day. The fact that the employer issued safety equipment to these individuals is somewhat inconclusive in circumstances where there was no attempt to retrieve that equipment from the eleventh individual. The employee handbook distributed on June 24 appears to confirm that the date of hire is the date one actually starts to work. In light of the employer’s past practice and the evidence of the parties’, there seem to be no dispute that this would be the day that individuals actually commenced working on the presses.

23. Given the evidence weighing in both directions, I also considered the apparent intention underlying the employer’s process. Although Ms. Renaud felt that these individuals were employees on June 24, she clearly understood that a failure to successfully complete the orientation session would in all likelihood foreclose the opportunity to work. That understanding was confirmed by Ms. McLean when she agreed that people would not have been told they had been hired prior to the orientation session because they had not as yet completed that orientation program. Both Ms. Renaud’s and Ms. McLean’s evidence confirmed that successful completion of the orientation program was essential in order to be called in to work. There is also little doubt from the evidence of Ms. McLean, Ms. Renaud, and Mr. Welch that individuals attending the orientation session

would not have been told that they had been hired. Further, the information that they received from the handbook and the fact that, as of June 24, they would not have understood that they were to be paid for that time, would have created an expectation or an understanding on the part of the individuals that they had not as yet been hired.

24. On balance, I was persuaded that the process engaged in by the employer was more properly characterized as part of a pre-hiring interview process rather than a first day of employment. It may be that the employer has been able to take advantage of economic circumstances which result in individuals being more willing to volunteer time in the hope of obtaining employment and as a result has been able to benefit from a more extensive pre-hire screening process. In any event, in all the circumstances, and for the above reasons, I found that these individuals were not employed on June 24, 1994 and are therefore properly excluded from the list of employees for purposes of this certification application.

1709-93-R Canadian Union of Public Employees and its Local 2451, Applicant v. Marriott Corporation (at Carleton University), Responding Party

Bargaining Unit - Combination of Bargaining Units - Practice and Procedure - Remedies - Board in earlier decision combining full-time and part-time units and remaining seized to deal with further relief - Union subsequently asking Board to set matter down for hearing with respect to remedial relief - Before listing matter for hearing, Board directing union to provide it and employer with detailed description of orders or remedies requested and detailed statement of all material facts on which it relies in accordance with Rule 12 - Employer directed to reply within seven days and to supply information required by Rule 14

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *E. G. Theobald*.

DECISION OF THE BOARD; August 19, 1994

1. This is the continuation of an application for a combination of bargaining units pursuant to section 7 of the *Labour Relations Act*.
2. By decision dated February 9, 1994 [now reported at [1994] OLRB Rep. Feb. 151], the Board directed the combination of a full-time and part-time bargaining unit of the respondent's employees and remained seized to deal with any further remedial relief.
3. On June 16, 1994 the applicant wrote to the Board requesting that the "matter be set down for continued hearing with respect to remedial relief". The letter further states:

"The Union has corresponded with the Employer since [the Board's February 9, 1994 decision] in an attempt to have the parties sit down and negotiate a merged collective agreement. The employer has never responded to the Union."

Attached to the union's letter are a draft collective agreement and two letters to the employer indicating that the union was preparing the draft agreement and, later, enclosing the draft for the employer's comments. The June 16, 1994 letter to the Board asks that the matter be set down for hearing as soon as possible.

4. By notice dated July 5, 1994 the Board listed this matter for hearing on Thursday, July 21, 1994. Prior to that hearing, however, the parties asked that it be adjourned to a date after September 12, 1994. Having granted that request, it is now time for the Board to consider re-listing the matter for hearing.

5. This would appear to be only the second time a combination application has come back to the Board under section 7(5). In *Olympia & York Developments Limited*, [1994] OLRB Rep. May 583, the Board heard evidence and considered the parties' submissions in support of the positions they had adopted in bargaining. Before determining that the parties had not made sufficient efforts to bargain their own solution to the integration issues, the Board commented:

"22. In all of the cases under section 7, the presumed starting point has been a process of bargaining. Before considering the exercise of its discretion under section 7(5), the Board has required the parties to explore their own solutions for whatever transitional difficulties might arise from the combination of bargaining units. That is the view that we expressed in the instant case, and it is consistent with the position taken in later cases.

23. It also seems to work. Since January 1993, the Board has made quite a number of consolidation orders (mostly on agreement), and not one of them has come back to the Board. We do not know the particular circumstances of these files, but experience seems to suggest that if the parties put their minds to it, they will find that the transitional problems are not as intractable as the applicant here suggests they are.

24. What is the content of the bargaining that should precede any request for an order under section 7(5)? We do not think that it is either desirable or possible to be too definitive about that. But at the very least, it should encompass the kind of reasonable efforts and full, rational discussion that have always been part of the "section 15" duty to bargain."

On that basis, the Board declined to make a direction under section 7(5).

6. In this case, the Board wishes to remind the parties of the need to bargain about the consequences of the combination order and to engage in "the kind of reasonable efforts and full, rational discussion that have always been part of the "section 15" duty to bargain". Accordingly, before this matter will be re-listed for hearing, the union must provide the Board and the employer with a detailed description of the orders or remedies requested and a detailed statement of all of the material facts on which it relies, in accordance with Rule 12 of the Board's Rules of Procedure. Within seven days of the receipt of this information, the employer is directed to respond to the union's request and to supply the information required by Rule 14.

7. Once the Board receives this material, it will determine whether and when this matter will be re-listed for hearing and what additional steps need to be taken.

0227-94-U Canadian Union of Public Employees and its Local 229, Applicant v. Marriott Management Services, Responding Party

Ratification and Strike Vote - Reconsideration - Settlement - Strike - Strike Replacement Workers - Unfair Labour Practice - Employer seeking reconsideration of Board decision finding that employer unlawfully using strike replacement workers - Board not permitting employer to resile from its earlier agreement with union that conditions in subsections 73.1(2) and (3) had been met - Reconsideration application dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

DECISION OF THE BOARD; August 15, 1994

1. In a decision dated May 3, 1994 regarding these proceedings, the majority of this panel of the Board, with Board Member Rundle reserving her decision, wrote as follows:

1. This is an application under section 91 of the *Labour Relations Act*.

2. For reasons which will be provided at a later date, the majority of this panel of the Board, with Board Member Rundle reserving her decision, hereby finds that the responding party has contravened section 73.1 of the Act by using Saskia Wagemans, Sandra Gilmour, Carole Smith, Linda Symonds, Colin Johnson, and Lorna Willis to perform the work of employees in the bargaining units that are on strike, and hereby orders the responding party to cease and desist from using those persons to perform that work.

Those reasons were provided by decision dated June 20, 1994 [now reported at [1994] OLRB Rep. June 729].

2. On June 6, 1994 the responding party (also referred to in this decision as the “Employer” and “Marriott”, for ease of exposition) filed a request for reconsideration of the Board’s May 3, 1994 decision (and a request for an expedited hearing of that reconsideration request). The applicant (also referred to in this decision as the “Union”) responded to those requests by letter dated June 13, 1994. By letter dated June 14, 1994, counsel for the Employer filed Marriott’s initial reply to the Union’s response, “without prejudice to its ability to make further representations and argument regarding the Response to the Request for Reconsideration”. In a letter dated June 15, 1994, after acknowledging receipt of that initial reply (and of the Union’s response), the Board’s Registrar wrote as follows:

Please be advised that if counsel for the responding party has any further representations or argument regarding the applicant’s response to the Application for Reconsideration, counsel should forward such to the Board on or before Friday, June 17, 1994.

In response to that letter, counsel for the responding party provided the Board with further submissions by letter dated June 17, 1994.

3. After duly considering all of that written material, the Board dismissed the Employer’s request for reconsideration (as well as its request for an expedited hearing in respect of that reconsideration request) by means of the following “bottom line” decision dated June 21, 1994:

For reasons which will be provided at a later date, the responding party’s request for reconsideration of the Board’s decision dated May 3, 1994 in respect of this application is hereby denied.

The purpose of this decision is to provide the Board’s reasons for denying the Employer’s request for reconsideration.

4. As noted in paragraph 3 of the Board's decision dated June 20, 1994, the parties (through their respective counsel) agreed, during the course of the first day of hearing of the Union's section 91 application, that the preconditions set forth in subsections 73.1(2) and (3) had been met in this case in respect of both the full-time and part-time bargaining units. The Employer's reconsideration request is, in essence, an attempt to resile from that agreement on the basis of information which it subsequently acquired concerning the manner in which the strike vote taken by the Union was conducted.

5. Subsections 73.1(2) and (3) provide as follows:

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
2. The strike vote was conducted in accordance with subsections 74(4) to (6).
3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

Subsections 74(4) to (6), which are referred to in paragraph 2 of subsection 73.1(2), provide:

(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

6. As further noted in paragraph 3 of the Board's decision dated June 20, 1994, after the parties agreed that the preconditions set forth in subsections 73.1(2) and (3) had been met in this case in respect of both the full-time and part-time bargaining units, they further agreed that the case should be decided on the basis of the stipulated facts set forth in that paragraph. The manner in which the case proceeded after the parties had reached those agreements is described as follows in that decision:

• • •

4. Since time constraints precluded the Board from completing the hearing of this matter on April 27, 1994, and since the Board found it appropriate to adjourn the continuation of hearing scheduled for April 28, 1994, the hearing of this matter continued on May 2, 1994. At the commencement of the continuation of hearing on that day, counsel for the responding party provided the Board with a copy of an application which he had been advised was soon going to be filed by an employee named Victor Carquez, calling into question the legality of the strike vote conducted by the applicant (also referred to in this decision as the "Union"). On the basis of that information, he requested that the instant application be adjourned until such time as a

decision had been rendered in respect of that application. After hearing and recessing to consider the submissions of the parties in respect of that request, the Board made the following unanimous oral ruling:

Having regard to all of the circumstances, we find it appropriate to proceed today as scheduled with argument in this case on the basis of the facts agreed to by the parties last Wednesday, during the first day of hearing of this matter. Those facts include an agreement between these two parties that the three conditions set forth in section 73.1(2) of the Act have been satisfied in the circumstances of this case. Although counsel for the responding party has brought to our attention an application which it is his understanding will soon be filed with the Board by Victor Carquez and which may call into question the legality of the strike vote conducted by the Union, there is no certainty that the application will in fact be filed nor that if filed, it will proceed to hearing and ultimately be successful. If that does in fact occur, it may ultimately have some effect on the enforceability of any order which the Union may obtain in the present case. However, we are satisfied that a ruling concerning the propriety of the responding party's using as replacement workers the six persons in question in these proceedings will serve the useful purpose of providing the parties with guidance on that important issue, and will ensure that the Union is not unnecessarily prejudiced by any delay on the part of Mr. Carquez in raising with the Board the legality of the strike vote conducted by the Union on March 8, 1994. Accordingly, the responding party's request that these proceedings be adjourned is hereby denied.

5. Counsel for the responding party then requested the Board to give his client "an automatic right of reconsideration in this matter". After hearing his submissions in support of that request (and advising applicant's counsel that it was unnecessary to hear from him on that matter), we indicated that we were not prepared to rule on that request as we were of the view that it was premature. We further indicated that if the application succeeded and Marriott was so advised, it could file an application for reconsideration, as could any party in proceedings before the Board. We also indicated that whether such application would be entertained by the Board and ultimately granted was not a matter which needed to be determined at that time.

7. Mr. Carquez filed a section 91 application with the Board on May 5, 1994. The hearing of that complaint against the Union (File No. 0398-94-U) commenced on May 9, 1994, before another panel of the Board. In a decision dated May 30, 1994, that other panel of the Board wrote as follows in dismissing Mr. Carquez's application:

1. In this application made pursuant to the provisions of section 91 of the *Labour Relations Act*, the union has asked the Board to exercise its discretion against inquiring into the merits of the matter, on the basis of undue delay in raising the issue.

2. Having heard the evidence and representations of the parties, the Board is satisfied that the passage of time since the events which form the basis of this complaint has resulted in a course of events and corresponding prejudice to the responding party such that the Board ought not to entertain the complaint. Accordingly, this complaint is dismissed. Further reasons will follow.

8. It is the responding party's position that, in the instant case, the Board erred in law and breached the rules of natural justice by declining to permit the Employer to reopen the issue of whether the strike vote taken by the Union was conducted in accordance with subsections 74(4)-(6), and proceeding to hear argument regarding the Union's application in the manner described above. However, the Board has concluded that there is no merit in that position for the following reasons.

9. The section 91 application initially filed by the Union makes no reference to a strike vote. It merely alleges that "[s]ince the commencement of a legal strike on April 11, 1994, Marriott Management Services have used newly hired employees to do work of employees in the bargaining unit(s) that are on strike", in violation of "Section 73 et al", and requests that Marriott "immediately cease and desist the use of replacement workers as outlined in Section 73 of the Ontario

Labour Relations Act”. In response to a demand for particulars by counsel for the Employer, Nancy Rosenberg (the Senior Officer in the Union’s Legal and Legislative Department) wrote the following letter to the Board’s Registrar (and sent copies of the letter to a number of persons, including Employer’s counsel):

The Applicant is in receipt of Mr. Cowling’s letter of April 22, 1994 in respect of the above-noted matter.

The Applicant submits that the Respondent is fully aware of the Applicant’s case with respect to the alleged violation of Section 73.1, given the exchange of correspondence which has taken place between the parties.

However, the Applicant wishes to amend its application to provide the following particulars:

1. On March 8, 1994 a strike vote was taken in accordance with s. 73.1(2). (attachment #1)
2. The strike vote was conducted in accordance with sub-sections 74(4) to (6) as required by s.73.1(2).
3. At least 60% of those voting authorized the strike as required by s.73.1(2).
4. By letters of April 11 and April 15, 1994, the Applicant gave the Respondent notice in writing that the bargaining unit was on strike in accordance with s.73.1(3)(b). (attachments #2 and #3)
5. By letter dated April 14, 1994 Linda Dumbleton wrote to Jim Fougere alleging that certain individuals were replacement workers and requesting that the Employer cease and desist using these individuals to perform bargaining unit work. (attachment #4)
6. By letter dated April 19, 1994, Jim Fougere responded and indicated that the following individuals are newly hired employees:

Saskia Wagemans
Sandra Gilmour
Carole Smith
Linda Symonds
Colin Johnson
Lorna Willis

(attachment #5)

7. The Applicant relies on the Respondent’s admission therein that those individuals above-named are newly hired employees and submits that they are replacement workers performing bargaining unit work.

The Applicant respectfully submits that the application is sufficiently particularized and should not be dismissed.

10. Marriott’s request for reconsideration asserts that Ms. Rosenberg’s letter “contained assurances that the Applicant had complied with the requirements under s. 73.1(2)”. However, that assertion is clearly incorrect. Ms. Rosenberg’s letter contains no such assurances; all that it contains are pleadings (in the form of “particulars”), which are statements or representations of what the Union alleges the material facts to be. The same is true of the statements made by Union counsel during the course of the hearing of this matter on April 27, 1994. If the responding party wished to test the validity of those statements or representations, it was open to it to put the Union to the strict proof of them. If it wished to avoid the necessity of having such evidence called by the Union at that time, but to leave open the possibility of reopening that issue in the event that it sub-

sequently obtained (through the exercise of due diligence) information suggesting that the Union had not complied with the requirements of subsection 73.1(2), it could have advised the Union and the Board that it was only prepared to agree on that conditional basis that those requirements had been met. It might also have sought to obtain an undertaking from Union counsel that the Union had complied with the requirements of subsection 73.1(2), or that the Union would not oppose a reopening of the issue in the event that the Employer subsequently obtained information suggesting that there had been a lack of compliance with the requirements of that provision. However, in the absence of any such condition or undertaking, the agreement between the parties that the pre-conditions set forth in subsections 73.1(2) and (3) of the Act have been met in this case in respect of both the full-time and part-time bargaining units (and that the case should be decided on the basis of the stipulated facts set forth in paragraph 3 of the Board's decision dated June 20, 1994) is binding upon both parties, and we are not persuaded that it would be appropriate to permit the responding party to resile from that agreement on the basis of information subsequently acquired, even if the Employer exercised due diligence in obtaining that information.

11. The Board has throughout the course of its history attached great importance to settlements and agreements which either totally or partially resolve issues in dispute in Board proceedings. See, for example, *Lorne's Electric*, [1990] OLRB Rep. Sept. 935, in which the Board wrote, in part, as follows:

• • •

10. The value and importance of the settlement process in labour relations cannot be overstated. Settlement documents are not and should not be entered into lightly and as a general rule a party seeking to resile from a settlement document will not be looked upon favourably by an adjudicator.

11. As the Board observed in *Crown Electric*, [1978] OLRB Rep. Apr. 344 at para. 17:

"Parties who enter into written settlements have a responsibility to ensure that they are fully aware of the implications of any document to which they attach their signatures. In the absence of any allegation of fraud the Board must assume that parties have agreed to any settlement plainly expressed in a written document, or otherwise no settlement would be immune from a subsequent challenge".

12. The Board's jurisprudence contains numerous examples of the sentiment expressed in the above quotation being applied to circumstances which may not involve a full settlement of all issues in dispute between the parties (see for example *Harnden & King Construction Ltd.*, [1986] OLRB Rep. May 635 where the respondent, having certified in writing the accuracy of the Officer's Report, was subsequently precluded from resiling from the parties' agreement (as reflected in the report) that a particular individual was not in the bargaining unit; *Ivaco Inc.*, [1987] OLRB Rep. Apr. 511 where the Board declined to entertain an application brought under section 106(2) by a trade union which had several months earlier agreed that the very individuals now the subject of the 106(2) application be excluded from the list of employees for purposes of the count in the certification application; *Lady York Food Market Ltd.*, Board File 1139-88-R, unreported, Jan. 12, 1989 where the respondent had initially raised allegations of intimidation and coercion in regard to the manner in which membership evidence had been obtained but subsequently signed an Officer's Report (and a waiver of hearing form) indicating the applicant was in a "vote position" and was ultimately found by the Board to be precluded from claiming a position - i.e. that the application should be dismissed without a vote on the basis of the allegations - inconsistent with the facts agreed to in the Officer's Report; and *Cedarwood Acres Limited*, Board File 0189-90-R, as yet unreported, July 20, 1990 where the objectors, having agreed, inter alia, to the voters' list and having certified that the vote had been fairly conducted, were not subsequently permitted to seek to add persons to the voters' list).

13. Also of interest in the present facts is the case of *We're Econoprint Fast*, [1987] OLRB Rep. Mar. 440. A group of objectors sought an extension of the terminal date so that an untimely

statement of desire would be accepted by the Board. The petitioner explained that the petition had not been filed earlier as a result of his reliance upon the employer's assertion that he was not to be included in the bargaining unit. The Board declined to extend the terminal date and cautioned that employees who rely on the advice of their employer with respect to this kind of issue do so at their peril.

14. In the present case the union, admittedly in reliance upon information provided by the employer during the course of the meeting with the Officer, agreed that there was only one employee in the bargaining unit. The union makes no allegation of fraud. If the union asserts that the information relied upon is incomplete or inconclusive, the appropriate time to raise such a concern is before, not after, agreeing to the conclusions which otherwise flow from the information provided. To allow the union to now advance a position inconsistent with its previous agreement as reflected in the Officer's Report would seriously undermine the efficacy and integrity of the Board's processes and the fundamental role of Labour Relations Officers within those processes.

12. Although that decision pertained to an agreement reflected in a Labour Relations Officer's Report, similar considerations apply to agreements reached by counsel and conveyed to the Board orally or in writing during the course of a hearing. It is quite common for parties in proceedings before the Board to agree that various questions of fact or law, or of mixed fact and law, are agreed to, undisputed, or otherwise not being placed in issue. Moreover, it is not unusual for a party taking that approach to be lacking complete knowledge, or indeed any knowledge, regarding those matters. A union, for example, may advise the Board that it does not dispute the voluntariness of a termination petition, even though it has little if any knowledge concerning the origination and circulation of the petition. An employee who has been discharged by an employer for reasons which are exclusively within the knowledge of the employer may agree to accept reinstatement without compensation for lost earnings, or compensation without reinstatement, even though s/he may have been entitled to both remedies if the matter had been heard and decided by the Board. A party may elect not to pursue an issue of delay on the assumption that there is a reasonable explanation for the delay, even though that may not in fact be the case. If the Board were to permit a party to resile from such agreements or tactical decisions on the basis of after-acquired information, there would be no finality in Board proceedings, and its processes would become interminable, to the serious detriment of all members of the labour relations community, including employees, trade unions, and employers.

13. Thus, for the foregoing reasons, the Board denied the responding party's request for reconsideration of the Board decision dated May 3, 1994 in this matter.

CONCURRING OPINION OF BOARD MEMBER JUDITH A. RUNDLE; August 15, 1994

In concurring with the majority opinion, I would draw attention to paragraph 10 of the decision which outlines how a responding party may wish to address the preconditions required in section 73.1-(2).

4092-93-R Education Support Staff Association, Applicant v. Ottawa Board of Education, Responding Party v. Canadian Union of Public Employees and its Local 1400, Intervenor

Certification - Collective Agreement - Pre-Hearing Vote - Timeliness - Trade Union Status - Staff Association wishing to displace CUPE as bargaining agent for employees of Board of Education - Staff Association found to be trade union within meaning of *Labour Relations Act* - Board concluding that extension of collective agreement to March 31, 1996 pursuant to section 35 of *Social Contract Act* making staff association's certification application untimely

BEFORE: *Ken Petryshen*, Vice-Chair.

APPEARANCES: *Jim Shields, Sue Johnson and Pam Stanley* for the applicant; *Sarah A. Eves, Rand Lintell* for the responding party; *James Hayes, Blaine Donais, Joanne Harvey and Cindy Dubue* for the intervenor.

DECISION OF THE BOARD; August 17, 1994

1. This is an application for certification in which a pre-hearing vote was requested. The Education Support Staff Association ("the ESSA") wishes to displace the Canadian Union of Public Employees and its Local 1400 ("CUPE") as bargaining agent for employees of the Ottawa Board of Education ("the Ottawa Board") employed in the support staff bargaining unit. The Board (differently constituted) directed the taking of a pre-hearing representation vote in a decision dated March 30, 1994. The vote was conducted on April 19, 1994 and the ballot box was sealed.
2. At a hearing scheduled to deal with a number of issues, the Ottawa Board took the position that the appropriate bargaining unit should deviate from the one contained in the relevant collective agreement by excluding casual employees. At the outset of the hearing, counsel for the Ottawa Board advised the Board that her client agreed to the ESSA's bargaining unit description which is consistent with the bargaining unit description in the relevant collective agreement. With this issue resolved, the parties dealt with whether the ESSA is a trade union and the timeliness of the application.
3. Counsel for the ESSA called evidence to support the contention that the ESSA is a trade union. The Board finds it unnecessary to review this evidence in detail. At its founding meeting on February 17, 1994, all of the persons who signed membership cards did so prior to any discussion, approval and adoption of the constitution. It was suggested that of all of the steps taken to form the ESSA, the timing of the signing of membership evidence may cause the Board some concern. In *Local 199 UAW Building Corporation*, [1977] OLRB Rep. July 472, employees became members prior to discussing and adopting the constitution. The Board referred to a number of cases where the Board found that there is no defect as long as the signing of members and the approval and the adoption of the constitution occurred at the same meeting. Since in this case all of the necessary steps were carried out in a single meeting, strict adherence to the technically proper sequence of evidence is not mandatory. On the basis of all the evidence, the Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
4. CUPE and the Ottawa Board both take the position that the application for certification is untimely. Simply put, the issue raised by the parties is what effect, if any, does the extension of a collective agreement by operation of section 35 of the *Social Contract Act, 1993* ("SCA") have

on the “open period” for the extended collective agreement. The parties agreed on the facts relevant to the timeliness issues. Those agreed upon facts are as follows:

- (1) CUPE and the Ottawa Board entered into a collective agreement for the period of August 1, 1992 to March 31, 1994.
- (2) By letter dated November 30, 1993, CUPE gave notice to bargain for the renewal of the collective agreement.
- (3) On January 31, 1994, the “open period” began as provided for in the Act.
- (4) On February 16, 1994 CUPE served notice on the Ottawa Board for an extension of the collective agreement to March 31, 1996 pursuant to section 35 of the *SCA*. The Ottawa Board confirmed the extension on February 21, 1994.
- (5) The ESSA filed its application for certification on February 28, 1994.
- (6) The decision to give notice to extend the collective agreement was made by Local 1400’s executive board. The timing of the extension was influenced by the organizing activity of the ESSA. A CUPE membership meeting was scheduled for March 1, 1994. A vote to ratify the executive board decision to extend the collective agreement did not take place at this meeting as intended since there was no quorum.

5. In essence, the ESSA’s application for certification was made during the “open period” when the collective agreement expired on March 31, 1994. However, CUPE gave notice to extend the collective agreement to March 31, 1996 prior to the filing of the application for certification.

6. The *SCA* is described in the statute as:

An Act to encourage negotiated settlements in the public sector to preserve jobs and services while managing reductions and expenditures and to provide for certain matters related to the Government’s expenditure reduction program.

7. I was referred to the following provisions of the *SCA*:

The purposes of this Act are:

1. To encourage employers, bargaining agents and employees to achieve savings through agreements at the sectoral and local levels primarily through adjustments in compensation arrangements.
2. To maximize the preservation of public sector jobs and services through improvements in productivity, including the elimination of waste and inefficiency.
3. To provide for expenditure reduction for a three-year period and to provide criteria and mechanisms for achieving the reductions.
4. To provide for a job security fund.

34.-(1) Nothing in this Part alters the termination date of a collective agreement.

(2) Nothing in this Part interferes with any right to carry on collective bargaining so long as any collective agreement reached is not inconsistent with this Act.

35.-(1) A bargaining agent may, by written notice to the employer of employees to whom this Part applies, require that a collective agreement be extended to March 31, 1996 if this agreement was or is governed by an Act that permits the employees to strike.

(2) The notice may be given before or after the collective agreement expires.

(3) The giving of the notice extends an existing collective agreement or, in the case of a collective agreement that has expired, revives and extends the expired agreement to March 31, 1996.

(4) This section applies despite subsections 34(1) and (2) and is subject to,

- (a) regulations excluding from the application of this section collective agreement provisions respecting staffing levels or workplace restructuring; and
- (b) subsections 24(4) to (9).

(5) This section is not limited to collective agreements that expire after June 14, 1993.

52. The provisions of this Act and the regulations prevail over the provisions of any other Act and the regulations thereunder but only to the extent necessary to carry out the intent and purposes of this Act.

8. I was directed to the following provisions of the *Labour Relations Act*:

5.- (4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 62, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

(5) Where a collective agreement is for a term of more than three years, a trade union may, subject to section 62, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.

57.-(1) If the trade union that applies for certification under subsection 5 (4), (5) or (6) is certified as bargaining agent for any of the employees in the bargaining unit defined in the collective agreement, the trade union that was or is a party to the agreement, as the case may be, forthwith ceases to represent the employees in the bargaining unit determined in the certificate and the agreement ceases to operate in so far as it affects such employees.

9. The positions of the parties can be briefly summarized as follows. Counsel for CUPE argued that section 35 of the *SCA* extends collective agreements and not merely the terms and conditions of those collective agreements in contrast to the circumstances in *Re Service Employees International Union and Broadway Manor*, (1984) 48 O.R. (2d) page 226. Once CUPE gave notice to extend the collective agreement, the collective agreement between CUPE and the Ottawa Board had an expiry date of March 1996, making the application for certification untimely. CUPE took the position that there is no conflict between the *SCA* and the *Labour Relations Act* and alternatively it argued that the postponement of the "open period" along with extension of the collective agreement was in accord with the intent of the *SCA*. Counsel argued that section 35 of the *SCA* demonstrates the intention of the Legislature to offset the imbalance in bargaining power which would occur when a union is prevented from bargaining on the issue of monetary increases. In part, the intent of the *SCA* was to preserve as far as possible the collective bargaining process

and the status of the incumbent bargaining agent. Counsel for CUPE took the position that the “open period” would occur during the 35th and 36th month of the extended collective agreement.

10. Counsel for the Ottawa Board agreed that the application for certification was untimely but also took the position that the “open period” would occur only during the last two months of the extended collective agreement. Counsel argued that there is a conflict between the *SCA* and the *Labour Relations Act* and that the *SCA* must be given primacy. Given that the *SCA* has taken away free collective bargaining, it was suggested that it was not inconsistent that section 35 of the *SCA* might also infringe on representation rights. Counsel argued that the effect of section 35 of the *SCA* is to extend the collective agreement to preserve the status quo and to protect the bargaining agent. There is a conflict between section 35 of the *SCA* and section 57(1) of the *Labour Relations Act*. If the Board were to issue a certificate to the ESSA the result would be the cessation of the extended collective agreement. Given section 52 of the *SCA* it was argued that the *SCA* must prevail by ensuring that the extended collective agreement continues to run until its termination in March 1996.

11. In support of its position that the application for certification was timely, counsel for ESSA made a number of arguments. He argued that in essence the notice to extend the collective agreement was not effective since the membership did not ratify the executive board's decision. It was also argued that by giving notice to bargain and taking advantage of the bargaining provisions under the *Labour Relations Act*, it was not open to CUPE to give notice under section 35 of the *SCA* to extend the collective agreement. Counsel for the ESSA also argued that both statutes can be construed so that the purposes of both can be accomplished without taking away the rights of employees under the *Labour Relations Act*. The *SCA*'s purpose is unrelated to labour relations issues while the *Labour Relations Act* addresses the rights of employees to select a bargaining agent. Counsel argued that by providing for the extension of collective agreements, the Legislature was not attempting to protect bargaining agents. If the Legislature had such an intention it would have expressed such an intention clearly. The Board was asked to reach the same conclusion that Board Member Wightman reached in *The Corporation of the City of Scarborough*, [1994] OLRB Rep. Mar. 300. In that case the collective agreement between the relevant parties had expired on December 31, 1992. The application for certification was filed on November 22, 1993 in accordance with subsection 5(4) of the *Labour Relations Act*. On November 29, 1993 the incumbent notified the employer of its intention to extend this expired collective agreement as permitted by section 35 of the *SCA*. The Board found that the application for certification was timely when filed. The majority found it unnecessary to rule on the argument advanced by the employer that the intent and purposes of the *SCA* can always be carried out without interfering with employee representation rights as set out in the *Labour Relations Act*. In a concurring opinion Mr. Wightman added the following thoughts:

2. Section 52 of the *Social Contract Act* states that its provisions takes precedent[sic] over other statutes, “but only to the extent necessary to carry out the intent and purposes of this Act”. The purposes of the *Social Contract Act* are expressly set out in section 1 of the statute and relate, generally, to expenditure reduction and control. They do not include, and can be carried out without, insulating [sic] trade unions or employers from the fundamental right of employees to express their views on trade union representation. Accordingly, I would have dismissed the intervenor's allegations for the further reason that the *Social Contract Act* does not purport to take precedent [sic] over employee representation rights set out in the *Labour Relations Act*.

12. The submissions of the parties raised two issues. The first is whether the application for certification was timely when filed on February 28, 1994. Secondly, if untimely, when could an application be made during the extended collective agreement.

13. I find that CUPE's notice to extend the collective agreement was an effective notice.

Section 35 provides that a bargaining agent *may* require a collective agreement be extended. Bargaining agents can make decisions in different ways and one common and valid way is by action of the local union executive board. There is no requirement in section 35 of the *SCA* that the local union membership decide whether or not to extend the collective agreement. Accordingly, the decision of Local 1400's executive board to extend the collective agreement is a decision of the bargaining agent within the meaning of section 35 of the *SCA* and the approval of the membership is not necessary. There is also no restriction on the right of the bargaining agent to give notice to extend the collective agreement. For instance, section 35 does not provide for the giving of notice only if notice to bargain had not previously been given. The provisions of the *SCA* and the *Labour Relations Act* do not lead one to the conclusion that the notice to extend the collective agreement under the *SCA* cannot be given when a bargaining agent had previously given notice to bargain. Indeed, section 35 suggests that the bargaining agent can give notice to extend at any time which would include after attempting to negotiate a new collective agreement. The fact that Local 1400 was aware of the ESSA's organizing drive and was partly motivated by this activity to give notice under section 35 of the *SCA* is also not a reason for finding that the notice was invalid.

14. In contrast to the provisions of the *Inflation Restraint Act* dealt with in the *Broadway Manor* case where only the terms and conditions of collective agreements were extended, section 35 of the *SCA* gives bargaining agents the option of extending collective agreements. When CUPE gave its written notice under section 35 of the *SCA* on February 16, 1994, its collective agreement with the Ottawa Board was extended to March 31, 1996. In effect then the collective agreement between the parties runs for a period of August 1, 1992 to March 31, 1996 once CUPE gave its notice to extend. The scheme of the *Labour Relations Act* places considerable significance for employees and trade unions on the duration of collective agreements. By permitting a bargaining agent to unilaterally extend the term of a collective agreement the Legislature was undoubtedly aware of the significance of such a step.

15. As was suggested in argument, one should attempt to interpret the provisions of both statutes to ensure that the intent of the Legislature is achieved. Section 52 of the *SCA* provides that the provisions of the *SCA* prevail over the provisions of any other Act but only to the extent necessary to carry out the intent and purpose of the *SCA*. In other words, if a conflict exists between the *SCA* and the *Labour Relations Act*, the *SCA* will prevail only to the extent necessary to carry out the intent and purposes of that statute. When the application for certification was filed the ESSA was confronted with a situation where CUPE and the Ottawa Board were bound by a collective agreement which expired on March 31, 1996. There is merit to the submission of counsel for CUPE that when the application was filed by the ESSA there was no conflict between the *SCA* and the *Labour Relations Act*. The *SCA*, given CUPE's notice to extend, determined what the term of the collective agreement would be. Other than assuring that collective agreements are for a term of at least one year, the *Labour Relations Act* does not generally dictate the duration of collective agreements. The *Labour Relations Act* however does provide for periods of time, given the duration of particular collective agreements, for employees to make decisions affecting their bargaining agent. With the *SCA* affecting the duration of a collective agreement and with the *Labour Relations Act* generally providing for "open periods", it is difficult to see where in this instance there is a conflict between the provisions of the two statutes. Although the ESSA and employees had certain expectations given the duration clause of the collective agreement prior to CUPE's notice to extend, there is no reason not to give full effect to that provision in the *SCA* which provides for the extension of collective agreements. Accordingly, this application is untimely since it was filed at a time when no "open period" was present for the extended collective agreement.

16. In turning to the second question of when the extended collective agreement would come open, I find again there is merit to CUPE's submission that the "open period" would occur

during the 35th and 36th month of the extended collective agreement. Subsection 5(4) of the *Labour Relations Act* provides that for a collective agreement of a period longer than 3 years the "open period" would occur during the 35th and 36th months. If a displacement application was filed during the 35th and 36th month, and was successful, it is not entirely clear that a conflict would exist between the provisions of the *SCA* and the *Labour Relations Act* which would cause one not to give effect to the "open period". However, even if a conflict exists as argued by counsel for the Ottawa Board given that section 57(1) would provide for the cessation of the extended collective agreement, the mere existence of a conflict between the statutes does not mean that the *SCA* will prevail. As section 52 indicates, the *SCA* will prevail only to the extent necessary to carry out the intent and purposes of the *SCA*. The purpose clause of the *SCA* makes it quite clear that the purpose of the *SCA* is to reduce the deficit and there is no indication in the statute either explicitly or implicitly that one of the purposes of the *SCA* is to protect bargaining agents from displacement or termination applications. If the intention of the Legislature was to provide such protection for bargaining agents one would have thought that such an intention would have been expressed quite clearly. Even if the provisions of the two statutes conflict during the period of the 35th and 36th months of the extended collective agreement, the *SCA* provision would not prevail since removing the right of employees to change their bargaining agent is not necessary to carry out the intent and purposes of the *SCA*.

17. Accordingly, for the above reasons, this application for certification is dismissed.

18. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

1535-92-R; 1602-92-R; 1467-92-U; 1615-92-U; 2124-93-U United Food & Commercial Workers International Union, Local 175, Applicant v. Price Club St. Laurent Inc. c.o.b. as **Price Club Westminster**, Responding Party v. Group of Employees, Objectors; United Food & Commercial Workers International Union, Local 175, Applicant v. Price Club St. Laurent Inc. c.o.b. as **Price Club Westminster**, Responding Party

Certification - Certification Where Act Contravened - Change in Working Conditions - Discharge - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Board finding that company did not violate Act in discharging union supporter or three managers, and that a number of other allegations not established - Employer violating Act in telling employee that he could not solicit for union on company property, promising to clear discipline records, removing last names from work schedules and time cards and offering Christmas bonus to employees as inducement to avoid dealing with union and thus interfering with union's organizing drive - Board inviting submissions on whether it ought to determine application under "old" section 8 of the Act before hearing adjourned unfair labour practice complaint - Board remaining seized as to all remedial matters

APPEARANCES: Douglas J. Wray, Vincent Gentile and Rick Wauhkonen for the applicant; E. L.

Stringer, Gail Warnica and Michael Sharrard for the responding party; *Mario Fiorino, Paul Davis* and others for the objectors.

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER W. A. CORRELL, August 8, 1994

1. These matters are two applications for certification (for a full-time and a part-time bargaining unit), including a request under what was section 8 (now section 9.2 in a somewhat different form) and related unfair labour practice complaints. The applicant union will be referred to below as the union or UFCW and the responding party as the company, the employer or Price Club. The alleged unfair labour practices include the discharge of a union supporter and a series of company communications to employees, as well as alleged violations of the freeze provisions of the Act. The company denies all the allegations.
2. A further complaint under section 91, file 2124-93-U was adjourned *sine die* on consent of the parties by Board decision dated January 20 1994, for a period not to exceed three months, and then requested to be relisted for hearing on April 18, 1994.
3. Issues relating to the bargaining unit and the level of membership support were dealt with by decisions of the Board (differently constituted) dated October 15, 1992 [now reported at [1992] OLRB Rep. Oct. 1098] and November 5, 1992. As a result of those decisions and the membership evidence submitted by the union, the union had just 55% membership support in the full-time unit. It is necessary to determine the issue of the discharge of Mr. Darnell in order to know if the union is in a position to be automatically certified in the full-time unit, because if his card is counted, UFCW would have the request level of support of more than 55%. In the part-time unit the union is in a position where the application would be dismissed, unless the application under section 8 is successful.
4. An application for interim relief was rejected by decision of the Board (also differently constituted) dated March 2, 1993, the reasons for which are now reported as *Price Club Canada Inc.*, [1993] OLRB Rep. July 635.
5. The matters before this panel which predate the Board's expedited scheduling system, required 27 days of hearing, over the course of a year, during which the Board heard evidence from 22 witnesses. Because of the number of allegations and the length of evidence and argument, only the most salient points are set out below, although all of it was carefully considered.
6. Several issues arose during the course of the hearing relating to the admissibility of notes taken by a union organizer of conversations with witnesses who gave evidence. The Board admitted the notes during the direct examination of the witnesses, over the objection of employer counsel, when they satisfied certain conditions: they had been used by the witness to refresh memory prior to giving evidence, they were made contemporaneously with the events to which they related, and they were verified by the witness as accurate at or close to the time they were made. When they were not used by the witness to refresh memory, but were tendered as evidence by the maker of the notes rather than the person who had made the statements recorded, they were not admitted. See the discussion in *The Law of Evidence in Canada*, Sopinka and Lederman, p. 850 and following. The Board declined to order the production of notes prepared by a business agent of interviews between counsel and witnesses, as they were prepared in contemplation of litigation. See Sopinka and Lederman, p. 653 and following.

Exclusion Order

7. An order excluding witnesses was in place throughout the hearing of the evidence in

this matter. A number of issues arose about its implications for interviews between counsel and witnesses after the exclusion order was in effect and the evidence had commenced as well as the appropriate manner for one side to ascertain whether an exclusion order is being respected. During the hearing it became clear that a representative of the employer was accompanying union witnesses out into the Board's corridors in order to observe whether breaches of the exclusion order were taking place and the Board was asked for direction on this. A concern had been raised earlier that petitioners' witnesses were being observed closely by union representatives. We said the following orally:

In the exercise of our discretion to control our own procedure and to ensure that testifying at the Board is not perceived as an occasion for surveillance, the Board directs that neither side is to monitor the activities of the other side's witnesses. Further issues relating to the exclusion order can be raised with the Board and dealt with on cross-examination. As the parties are aware, any breaches of the exclusion order may have serious effects on the weight the Board gives to the witnesses evidence.

8. For useful discussion on the purpose and ambit of exclusion orders, see *Volkswagen Canada Inc.*, [1991] OLRB Rep. Dec. 1423 at (1425); *Dobberthien v. The Queen*, (1974) 50 D.L.R. (3d) 305 (S.C.C.) and *Regina v. O'Callaghan*, (1982) 35 O.R. (2d) (Ontario High Court). See also *The Law of Evidence in Canada*, Sopinka and Ledeman at pages 826 to 828. In this case none of the matters raised about the exclusion order, particularly an allegation (which was denied) about preparation of witnesses together, became material to our findings. However, the fact that issues arose on a number of occasions underlines the prudence of conduct which gives no cause for concern - either in the area of sharing evidence or in the area of conduct of one side to the witnesses of the other which can be perceived as surveillance. In another case, such matters could become important to the Board's determination of issues including credibility and whether the true wishes of employees were likely to be ascertained.

Background

9. Price Club operates a series of warehouses in Ontario and elsewhere which are open to those enrolled as members. The company markets a wide range of products to its members according to a scheme which includes selling in bulk, with a very plain shelf presentation, in order to offer attractively low prices. The events in issue here took place at the London, Ontario warehouse, which opened in November, 1990. There are approximately 100 full-time and 85 part-time employees affected by these applications.

10. The UFCW started a campaign to organize the employees in the London Price Club warehouse in April of 1992. The campaign lasted throughout the summer of that year, and applications for certification were made for the full-time unit on August 26, 1992 and for the part-time unit on September 4, 1992. The allegations before us date mainly from the period of the campaign, although there are a number from earlier dates, as well as several from the period during which these hearings were held.

Pre-Campaign Allegations

11. It is alleged that even prior to the campaign by the UFCW, in 1990, 1991 and 1992, managers were told by their superiors to report union supporters, and briefed on how to respond to unionization, as well as to get rid of three named union supporters. The evidence is that early on the company asked its managers to be aware of unionization and problems that might lead to it. As well, the evidence indicated two managers told an assistant manager to be wary of three individuals who were thought to be supportive of unions in general and to write them up if they did anything wrong. However, evidence that these individuals either quit or were terminated on the basis of

inability to attend work was not disputed. Thus, we do not find that the evidence warrants a conclusion that the departures of the employees referred to was motivated or caused by anti-union animus.

Sunday Premium

12. On June 19, 1992, the company introduced a \$2 premium for Sunday work. The union says this was a very generous premium meant to respond to the union's organizing campaign. The company says that this was prompted by the Province's change of law on Sunday opening and was arrived at after a review of the competition's premiums. This occurred before the freeze was in effect. It is clear that it is not illegal per se to offer premiums for Sunday work which becomes permissible for the first time during the union campaign. Although generous, we are not persuaded by the evidence that the premium is illustrative of anti-union animus.

Ken Darnell Discharge

13. Cards were signed by UFCW staff and employee organizers starting on April 8, 1992. Ken Darnell, whose discharge in August, 1992 is in issue, signed a card on June 9, 1992. He indicated to Rick Waukhonen, the UFCW organizer responsible for the campaign, that he preferred not to solicit signatures, but would talk to employees about the union as he found the opportunity. He referred at least one employee to a collector to sign a card. We are of the view that Mr. Darnell is to be viewed as a supporter of the union campaign, whose views were known to a number of employees to whom he spoke. However, he was not one of the high profile union supporters. There was evidence of conversations between Mr. Darnell and more high profile employee and ex-employee organizers, observed by managers, from which it can be inferred that some management members knew or believed that Mr. Darnell had discussed the union with known union organizers. The company in general appeared to be reasonably well informed as to the identity of vocal union supporters.

14. On August 10, 1992 video surveillance of the cigarette aisle in the London warehouse showed Mr. Darnell with his back to the shelf, removing cigarettes and placing them in his maintenance cart. When Bernie Martin, a loss prevention clerk, reviewed the tape, he concluded that the manner in which Mr. Darnell had removed the cigarettes indicated concealment, and brought this to the attention of Peter Dimichele, the warehouse manager. After consulting with his superior, Jean Third, Mr. Di Michele told Mr. Darnell he was fired on August 11, 1992.

15. The central issue as to Mr. Darnell's discharge is whether the company's action is free of anti-union motivation or not. The company's position is that it had clear evidence of theft, and a strong policy of discharging for theft, which were the only considerations it had in discharging Mr. Darnell. The union says that this is not credible, given the timing of the discharge in the middle of the union campaign, and Mr. Darnell's known support for the union. The union says that the company chose to discharge to make an example of Mr. Darnell, to slow down or stop the union campaign. In support of this, the union brought evidence relating to information the company had both before and after the discharge decision, which in the union's view indicates that no cigarettes were missing at all. In this regard, the Board heard extensive evidence about cigarette audits.

16. In the context of the Board's jurisprudence on the reverse onus, the union urges the Board to draw the conclusion that the Darnell discharge was motivated, at least in part, by anti-union animus, by inference from all the facts considered together. The union points to the position of the company which was clearly opposed to the formation of the union from its early awareness of the campaign. The union argues that all the evidence would suggest that the company knew of Darnell's pro-union views before the discharge. If the company's denial of this is not credible, the

other reasons given for the discharge should not be believed. In light of the reverse onus, the complaint should then be allowed. The fact that the company did not discipline more high profile union supporters should not assist the company; it should not be in a better position for being more subtle, argues the union. The union asserts that the company, given the opportunity presented by the video, chose to discharge Darnell, an older worker, who had been vocal in support of the job security the union was offering, to send a message to the young people who make up the great majority of the bargaining unit, that their jobs were not secure. The union alleges that the discharge caused much unrest amongst the employees and a chilling effect on the campaign, and that this is a predictable result of such a discharge at a critical time in the organizing campaign.

17. The union argues that what happened to Darnell is consistent with the evidence of the company's approach to the question of unionization even before there was an active organizing drive. The company did not plan to discharge union supporters without a case against them; they planned instead to build a case against them. Darnell was discharged once the company had something "on him", the video, ambiguous though it was in the union's view. Then the company would not backtrack in the face of evidence to the contrary, because they wanted to make their point about their control over employees' jobs. The union notes that the company made its decision to discharge Darnell and had all the papers drawn up, met and told him he was fired, before they asked for any explanation. Also contributing to the union's view of the case is that fact that there was no attempt to search Darnell or his locker on the day the theft occurred, or at all. Nor does the union believe the company has adequately explained why no criminal charges were laid when it is the company's policy to do so in cases of theft.

18. Further, Darnell knew there were surveillance cameras operating, and had a reasonable explanation of what had happened; the company was not interested in the explanation, submits counsel. Union counsel observes that there is no dispute that if Darnell did what he said, put damaged cigarettes in the merchandise return area, that was a proper thing for him to do. In light of this, the union argues the company's approach lacks credibility; for instance, when Ken Darnell gave his explanation, there was no attempt by the company to go see if the cigarettes were where he said they were.

19. Fatal to the company's case, in the union's submission is the failure to call Peter Dimichele as a witness. Warehouse manager at the time, he was instrumental in firing Ken Darnell. The fact that he was fired shortly after Darnell should not assist the company, in the union's submission.

20. By contrast, the company argues that the company fired Darnell for one reason: the well-founded conviction that he had stolen cigarettes. The company's policy, consistent with the practice in the retail industry, to discharge for theft, was well known. The company's position is that it had solid video documentation of theft, and the company merely implemented its policy. Counsel stresses that Mr. Darnell was not a high profile supporter or organizer for the union and that none of the known union supporters were disciplined throughout the campaign. There is no credible evidence of a campaign of anti-union activity in general, says company counsel. And the timing is four months after the company became aware of the campaign.

21. Company counsel argued that it was not necessary to call Mr. Dimichele as a witness to discharge its onus of proof. To start with, says counsel, there was no allegation that he was anti-union. The union's evidence about Mr. Dimichele was from a key union employee, Joe DaFonseca, who said that Peter Dimichele had said that he did not care if the union came in as long as sales stayed high. Counsel says that it is not Peter Dimichele who collected the information leading to the discharge, but Bernie Martin who gave evidence of coming across it in the normal

review of the surveillance videos. Counsel submits that the Board has seen everything that DiMichele saw on the video and there is not the slightest absence of relevant evidence from not hearing from Mr. Dimichele. The Board has heard from Jean Third, the decision maker, and from Bernie Martin, who discovered the theft, as well as having seen the video itself. Noting the union's evidence about Dimichele's neutral animus, counsel submits there is no room for an adverse inference from the failure to call a discharged manager where there is no evidence that he would have had to account for.

22. Ms. Third, then Manager of Operations for Ontario, gave evidence that she directed Peter Dimichele to fire Mr. Darnell, that it was her decision. This aspect of the evidence was not challenged. She testified that she had a conversation with Peter Dimichele in which she asked him to describe the video to her, and that he told her her what he had seen, and that an OPP officer had viewed the video and expressed the opinion that it was clearly theft. Dimichele asked if she would give authorization to terminate. She asked him if he felt confident that it was theft. He assured her he did, and she gave the authorization to terminate, since it was her experience that there had never been a case of theft in which Price Club did not terminate. She did not even know who Ken Darnell was at the time, let alone if he was a union supporter.

23. After the decision to terminate, Ms. Third saw the video. She also looked at cigarette audits which told her, among other things, that there were ten cartons of cigarettes missing since August 10, the day the video had shown Darnell taking cigarettes. She concluded that the video clearly showed concealment because of his having his back to the shelf of cigarettes, and the rapidity of his movements which were unlike any other of his movements on the tape. She later looked at other audits to try to check out a warehouse rumour that there were no cigarettes missing. The summary she received from the auditor showed a loss of over \$20,000 in cigarettes for the month of August alone, and each of the five weekly audits leading up to the week of the discharge showed cigarettes missing. She also concluded that the fact that there were cigarettes in the merchandise return area did not shed light on whether Mr. Darnell had stolen, since there are always some cigarettes in that area. Bernie Martin heard the explanation given by Ken Darnell, that he had returned the cigarettes to the merchandise return area because they were torn, and wondered how he could tell a carton was torn with his back to the shelf.

24. Counsel for the company says that the reason Ken Darnell was not searched was that they were satisfied when they saw the video that it was a theft. As well, searching Darnell several hours after the theft, or the merchandise return area 24 hours later, when Darnell gave his explanation at the discharge interview, would not have added reliable information, submits counsel. The company's position is that they had no way to tell what kind of cigarettes were taken. In any event, there is evidence from Guy Riopelle, a loss prevention clerk, that a short time after Darnell says he took the cigarettes to the merchandise return area, there were none of the brand he says he put there in the merchandise return slot. There were just the ones Mr. Riopelle had put there himself the night before.

25. As well, the company argues that the fact that Darnell knew there was a camera does not help him when he also knew only one was recording at a time and his body was positioned in a way to hide what he was doing from the camera.

26. Both sides lead considerable evidence about the meaning of audits done on a regular basis and after the theft. Given the attention given this subject at the hearing, we have considered it in detail. However, we have determined that the evidence was not determinative on the question of the company's motivation for the termination, and thus does not warrant lengthy analysis here. Suffice it to say that, by the end of the week of Darnell's discharge, Jean Third was in possession of

a number of pieces of information from cigarette counts. This included information that could be interpreted to mean that none of the brand Mr. Darnell says he took were missing, as well as information that suggested that large quantities of cigarettes were missing overall. As well, the company was of the view that the video was obscure as to what brand Mr. Darnell had removed, and that too much time had elapsed to make the information conclusive in any event, since cigarettes previously hidden could have been retrieved and returned to the merchandise return area. It is our conclusion from all the evidence that the audit information was honestly considered by Ms. Third to be insufficient to exonerate Mr. Darnell in light of the company's view of the video as clearly demonstrating stealth.

27. This aspect of the case is one that falls to be determined mainly on the facts, because the law in this area is well settled. The onus is on the company to establish on a balance of probabilities that the discharge was motivated for valid business reasons and not, even in part by anti-union motivation. See *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 among many others.

28. It is important to be clear that the reason the Board looks at evidence of the facts at the company's disposal surrounding the decision to discharge is not to decide whether or not Mr. Darnell was stealing. Rather, it is to decide if the company's motivation in firing him was a bona fide belief in his having stolen. If the theory put forward by the company for the discharge does not stand up to scrutiny, the union's theory of the case - that it was not theft, but union activity which explains the discharge - would take on more weight.

29. We have concluded that the company has discharged its onus of proof on the Darnell termination. We found the account of the company witnesses convincing as to how the video evidence triggered the discharge, and that the after-acquired audit evidence was not considered sufficiently compelling to change the result. Although we do not discount the possibility that Mr. Dimichele and Bernie Martin knew Mr. Darnell was a union supporter, we do not find there to be any persuasive evidence that Ms. Third knew that when she made the decision to fire him. We do not think, even accepting that the company knew Darnell supported the union, that this would be enough to outweigh the objective evidence of the video tape, which we find was honestly interpreted as theft by Bernie Martin and Jean Third, the witnesses we heard from on the subject.

30. The standard of proof is the balance of probabilities. In light of that standard we have concluded that the failure to call Mr. Dimichele is not fatal to the company's case, although it is the most troubling aspect of the case on the Darnell discharge. However, there is little in the evidence to lead us to suspect that Dimichele was acting out of a desire to send a message about union activity, rather than employee theft. Although Richard Adams gave some evidence that would suggest that Mr. Dimichele had at one time expressed concern about employees who appeared pro-union, at a time when there was no organizing drive, there is more pertinent evidence from the relevant time period that supports a finding that Mr. Dimichele was not anti-union in his orientation. For instance, the account of Mr. Dafonseca, a vocal union supporter, to Mr. Waukhonen shortly after the Darnell discharge of a conversation with Mr. Dimichele indicates that Dimichele had explained that the company always discharges for theft, and that he was sympathetic to Mr. DaFonseca's concerns about equal treatment for union supporters and opponents. He is quoted by Mr. DaFonseca as saying that he did not care if the union came in as long as sales stayed up, not an anti-union remark. Although there remains the possibility that anti-union animus co-existed in Mr. Dimichele's mind with the legitimate business reason for the discharge, a belief based in objective evidence that Mr. Darnell was stealing, it is a possibility only. We find the evidence insufficient to raise that possibility to the level of a finding that the company has not discharged its onus of proof, given that we are persuaded that Ms. Third based her decision only on her honest conviction that Mr. Darnell was stealing.

31. For the above reasons, the complaint is dismissed in regards to the Darnell discharge.

The Petition

32. Because of the conclusion above about the Darnell discharge, his card will not be counted in the certification application. This means that the union has enough membership support for a vote, in the full-time unit, but not for automatic certification, unless the section 8 request is accepted. As the most that would be obtained if the Board found that the petition was a reliable voluntary expression of employee wishes is a vote, it is not necessary to determine the issues surrounding the petition. To the extent that the evidence heard about the petition is relevant to the issue of the section 8, we have considered it in coming to our conclusions below. However, we do not propose to deal with the lengthy evidence about the voluntariness of the petition as it is not necessary to do so.

Other Allegations

33. Generally, it is alleged that the company was engaged in a pervasive campaign to convince employees to reject the union, which is said to have included increased frequency of meetings with employees, extensive written material, various forms of inducement and breaches of the freeze provisions. The union alleges that in its various actions and communications, the company breached sections 3, 65, 67, 71, 81 and 82.

34. We will deal with these matters in two general headings: (i) written communications and (ii) other matters, including those falling generally into the categories of allegations of interference, inducement and breach of the freeze provisions.

i. Written Communications

35. Beginning in May, 1992, the company sent memos and letters to the employees, in response to becoming aware of the union campaign and various literature that the union was sending to the employees. The most recent written communications were sent during the hearing of these matters. We will summarize the disputed written communications and the parties' positions on them:

1. May 26, 1992: A one page letter from the company president, Pierre Mignault, invites employees to speak to their superior or company representative, should they have any questions or concerns. It indicates that the company does not believe in union bashing, but that employees should have the opportunity to come to a decision after considering all the facts. It includes the sentence, "While we believe that there is no need for a third party to intervene in our relationship with our employees, you should realize that the decision is yours to make and the company respects your right to do so." The union argues that this type of letter from the president is unprecedented, and nothing like previous communications from the company about issues like the opening of a warehouse. The ones directed at the union campaign were attached to time cards or distributed with pay, rather than being left on tables in the cafeteria. Other letters were not just directed at one store's employees, appeared much less often, and were much more cursory.
2. May 29, 1992: Another letter from the president, four pages long,

which indicates it is intended to help employees focus on the relevant facts and issues to weigh in making this important decision. It includes a section, "Let's look at the union sales pitch" which deals with the things the union is offering, says dues are \$15 to 30 per month and expresses the view that if employees look at the issues and the company's track record of fairness and generosity, they will come to the conclusion that the union has nothing to offer for the money.

3. June 8, 1992: A memo from Peter Dimichele, the warehouse manager, announcing that management is setting up a question box for two weeks to give employees another avenue to ask questions, which could be anonymous. Jean Third testified that part of the reason for this was to give the company time to make sure the answers were in the bounds of the law.
4. June 9, 1992: Minutes of a meeting of part-time staff representatives which were posted in the workplace. They include questions and answers on issues such as when an employee who does not want to be part of a union will have to pay dues, how much dues are, and whether employees have the right to express their opinion. There is a question on whether it is possible to start a petition against the union, to which the company answers: As an employer we cannot give you advice. Only legal counsel that you seek yourself would be able to advise you.
5. August 7, 1992: A memo from Jean Third answering questions from the box set up in June and questions people had asked of managers. The union observes that this is the day after Joe DaFonseca told the personnel clerk that the union was in a certifiable position, and the day two supervisors were fired. One of the questions is whether Price Club can terminate someone for no reason. The answer assures employees that employees are only terminated for consistent refusal to comply with reasonable expectations, after having been informed of acceptable standards, except in the case of illegal conduct or repeated insubordination. The company deals with how it sets pay and benefits, in comparison to union and non-unionized workplaces, and that they are looking at the pension plan and Sunday pay premium. The memo states that Price Club does not believe its employees need a union and that unions see Price Club as a golden opportunity to generate much needed cash flow through union dues. The company says it truly believes the employees have nothing to gain from a union, because of its compensation, benefits and treatment of employees, including the open door policy. It offers the information that employees can write to the Labour Board, if they have changed their mind after signing a union card as unions usually won't give a card back. The memo states that the law limits what management can discuss, says that the union is allowed to visit employees but advises that individuals can tell them you do not wish to speak to them if that is how you feel. The memo says supervisors are going to be given training in September, details how the company's ratio of

full-time employees compares favorably to the competition's, and invites employees to contact three senior managers with any additional concerns they may have.

The company argues that this is pure information, containing no encouragement about petitions, maintains no promises, and no inference employees should sign an anti-union petition.

The union argues that although this is not a letter saying that the company will close shop, no employee would have any doubt about the company's views: The union has nothing to offer and we'll review all the things that might be a problem without the union.

6. August 13, 1992: A one page memo from Jean Third communicating reassurance about job security after the three terminations in the past week (Darnell, and the two supervisors, Moody and Derbyshire). It states that the company cannot and will not terminate because of the union. It says that while the company thinks employees do not need a union, employees can make any decision they want without fear that this will lead to termination.
7. August 27, 1992: A two page notice from Gail Warnica, the Ontario Region Human Resources Manager, about the union's filing of its application for certification for the full-time unit. It includes statements to the effect that the union is not doing as well as they were saying, that employees should not be pressured into signing a card and that employees have the right to join or to oppose the union.
8. August 31, 1992: A memo from Jean Third in reaction to a letter from the union asking people not to sign an anti-union petition. It states that the law is that no one can pressure you regarding your decision to join or oppose a union. It invites employees to consider whether the union has done as well in regards to wage increases in other workplaces as at Price Club. It gives the company's view of the union's contract with a competitor, states that the union's promise of job security means lay-offs by seniority, and points out that Price Club has not laid anyone off. It asks employees if they think they will be better off for paying the union \$300 a year.

Company counsel argues that this was in response to a union leaflet saying to make sure not to sign a petition, but that it says that no one can pressure you or interfere and is not a contravention of the Act. The union argues that the message was quite clear that the company was encouraging people to sign petitions against the union.

9. September 11, 1992: A memo from Jean Third indicating that the union had filed a certification application for the part-time unit on September 4, and giving the terminal date and noting their expectation that the part-time application would be heard together with the full-time one.
10. September 23, 1992: A letter from Jean Third noting that the union

had filed a complaint alleging unlawful practices. It states that the company does not wish to debate the accusations in writing, but that it will be objecting strongly to the union's accusations at the Board. It says that it considers the union's unusual step of sending a list of the allegations to all employees to be an indication of how desperate they are becoming to secure support from employees.

11. October 7, 1992: A letter from the company president, which constitutes a province wide response to a UFCW flyer on job security given to London and Vaughan warehouse employees. It states that even unionized employers have to take action when there is a sharp decline in a company's performance, but that this has not been the case at Price Club where over 1,000 new employees have been hired. It states the view that the growth of Price Club is employees' real job security and notes that even when the company was forced to close on Sundays it did not reduce the number of employees even though sales suffered. It mentions the company's open door policy for grievances and its written procedure of progressive discipline aimed at making sure employees are not released without just cause. It states the company's pride in the conditions of work it offers, and says that employees do not need to "stand up" to the company at the Labour Board to solve problems. It concludes with the line, "Do yourself a favour, consider whether you need a union here at Price Club."

The union says that the comment about standing up to the company at the Labour Board can only be an attempt to dissuade employees from testifying. The company maintains they just wanted not to have an adversarial relationship and were responding to union material which referred to the hearings of these applications as standing up to the employer at the labour board. Counsel points out that the letter also talks about hiring even without a union, a wage increase, and a personnel manager who will listen to their concerns.

12. October 19, 1992: A memo from Jean Third to London employees describing the Board's decision on the bargaining unit issues. It says that based on the count there will probably be a vote in the full-time unit and a dismissal in the part-time unit, although it notes that the hearings on the unfair labour practice complaints will have to occur first, and says the company will keep employees informed.
13. October 26, 1992" A letter from Pierre Mignault to all London employees, in response to the most recent UFCW communication. It states that the union likes to employer bash rather than give positive or relevant facts. It states that the union has told mostly a list of untruths and gives its view of the accurate facts concerning its rights to talk to employees about the union's organizing activity, its method of determining pay increases and protection from job loss among unionized employees. It concludes with the following paragraph: "As a sensible person working in the 90's you can and should decide for yourselves - but make sure that your decision is based on the relevant

and truthful facts - and not on the union's name calling, employer bashing and long list of untruths."

14. November 4, 1992: A memo from Gail Warnica answering the union's flyer entitled, "Price Club Jumps the Gun Again", which took issue with the statements in Jean Third's October 19 memo. It states that the company was correct in the facts about the numbers, that it is not engaging in illegal conduct by talking to employees, and that theft is just cause. Ms. Warnica writes that the company is trying to be honest and forthright about the process and invites employees to direct questions to managers.
15. November 25, 1992: A memo from Gail Warnica to London employees to answer union communications, which gives the company's position on the removal of last names from the schedules, the use of salary surveys and invites employees to make comparisons with collective agreements at the OLRB library.
16. March 22, 1993: A memo from Gail Warnica letter saying the Labour Board case is going very slowly and that the company has offered a secret ballot vote, and they do not understand why the union will not agree to that.
17. May 26, 1993: A memo from Pierre Mignault about the closing of a Price Club warehouse in Surrey, British Columbia on May 29, 1993 for financial reasons. There is a heading "Job Security" which says that the company expects that the UFCW will suggest to all our employees that if they had been present in the Surrey warehouse there would not have been a closing. The company says this is not so, and that there are unionized workplaces which have closed. "...when the union talks about job security, it really means that lay-offs will occur based upon the principles of seniority, not prevented altogether." The memo assures employees that Price Club is strong and healthy and continues to grow with new warehouses opening.

Then there is a heading "Harassment" which precedes the closing two paragraphs which read as follows:

In addition, we feel you should be aware of the tactics which the U.F.C.W. is using in Ontario in an attempt to gain support for their organizing campaign. On Thursday, May 20, 1993, several individuals wearing U.F.C.W. t-shirts and baseball caps formed a human chain at the membership exit from the Mississauga warehouse forcing our members to pass through the chain and receive a union pamphlet calling on them to support the U.F.C.W.'s organizing campaign. These actions were clearly illegal.

We have received a number of telephone calls from our members complaining about this harassment. The U.F.C.W.'s conduct in harassing our members is illegal and irresponsible and will not be tolerated. Remember, we have a shared commitment to meeting our members' needs and expectations. Let's continue this commitment

and ensure that they continue to shop with us. Do you really need a union which is responsible for annoying our members and thus potentially preventing us from increasing sales and employment?

The company does not back away from calling the union's activity harassment and irresponsible conduct. The company submits union organizers were interfering with the shoppers; that is not what section 11(1) permits. The legality of the union's conduct is not, however, an issue before us, and no evidence was called which challenged the veracity of the assertions made therein.

36. Company counsel submits that all the company communications are well within the boundaries of employer free speech, guaranteed by section 65. It is argued that the tone of the company material is moderate compared to the material from the union, more voluminous than the employer's, to which it was responding. Company counsel describes the union material as strident and insulting, in its frequent use of epithets such as company stooge and showing pictures of a crude, fat boss. It is submitted that, particularly in context, the moderate company response cannot be considered supportive of any general anti-union animus or the union's section 8 application.

37. The company argues that even if there were a few errors, such as in the exact level of union dues, the union had ample opportunity to correct them, which it took in a number of its communications. The union argues that this could be said of any remark. One could say the employer could make the most outrageous threats, but the union could respond; this does not take into account the responsive nature of the employment relationship.

38. The union sees the written material as clear evidence of a protracted campaign to interfere with the organizing campaign by discrediting the union and offering promises to employees.

39. It characterizes the last of the memos, as posing the question, "Do you really need a union who is responsible for annoying our members?" This is not the model of restraint company counsel describes, says union counsel.

40. The company has a right of free speech, set out in section 65, which is circumscribed by the qualifiers also set out in that section, that it must not be exercised to interfere with the formation of a trade union or to an extent that amounts to coercion, intimidation, threats, promises or undue influence. The Board has indicated on a number of occasions that a mere expression of opposition to unionization will not breach the section, as employees generally expect their employer to have reservations about unionization. However, if the employer uses its authority unfairly to sway employees, for instance by promises, or threats to job security, the employer's conduct will be found to have crossed the line into undue influence. See among many others, *Seven-Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87.

41. In interpreting the Act, one of the most difficult lines to draw is between permissible and impermissible influence. The Board has made clear that incidental effects of legitimate employer action which might be said to interfere with the union's activities will not be illegal, but activities aimed at impeding the exercise of free choice by the employees will be.

42. There is no doubt that the employer in this case engaged in a vigorous campaign aimed at convincing employees that they had nothing to gain from a union. The argument on behalf of the company was that this was entirely within the bounds of free speech as the content was factual and informative, rather than coercive. The union's argument in essence is that it is not necessary to threaten to close a business to be engaging in undue influence.

43. The responsive nature of the employment relationship is something that the Board

takes into account, to the extent that subtle wording or sophisticated approaches which are nonetheless coercive or unduly influential will be found to be breaches of the Act. However, the section specifically provides the right to express views and it is very likely that the legislature contemplated that the opinions an employer might like to communicate would be the preference to do business without what some employers view as the encumbrance of a union. Price Club was regularly communicating its desire to operate without a union, often couched in language indicating that employees had nothing to gain from unionization.

44. Within itself, the Act acknowledges the competing interests of the parties. Although it promotes collective bargaining as a matter of public policy, it recognizes there will be dissenting views. In view of that, the Board has been cautious when confronted with employer communications which are in the nature of propaganda, but stop short of coercion or undue influence. In our view, the touchstone for doing the somewhat delicate line drawing exercise required by the Act must be the idea of what is likely to impair freedom of choice. It is that which section 3 is aimed at. The Act protects employees' rights to choose, by regulating the parties' conduct, but it does not indicate that the debate and disagreement which are the necessary foundation of democratic choice are to be curtailed.

45. The line between acceptable persuasion and improper wielding of the economic power employers have over their employees is sometimes a very fine one. The matter is further complicated by the variability of employee response. Employees often range from those who are likely to take the slightest indication of employer preference as a "must do", to those who will be reinforced in allegiance to the union by the very fact that the employer is vocal in its preference to not deal with the union. Employees also include those who are independently minded in regards to both parties or who have great difficulty in knowing their own mind. The Board has attempted to use as its index no extreme of employee response, focusing instead on the concept of the reasonable employee. The Board knows that employees are very concerned about their livelihood, and has been quick to censure anything which links unionization to threats of job loss.

46. The evidence of the employees who testified in this hearing made clear that Price Club employees, too, cover a broad spectrum of response. Despite the receipt of all the above written material, at least one employee testified to not knowing what the employer's position was, although they either started with very similar views which they expressed in very similar language, or had internalized it. Others clearly considered things they heard from the employer as something to be considered and checked out. Undoubtedly others thought the material was just employer talk, to be rebutted or ignored.

47. We have carefully considered the above communications separately and together. They can be characterized as a frequent, vigorous assertion of the employer's views. We have come to the conclusion that none of them individually goes over the line into undue influence.

48. The tone of the memo concerning the union's tactics on May 20, 1993 is of potential concern. However, in the absence of any evidence disputing the assertions made, we are not persuaded it amounts to interference or undue influence. The number and regularity of the communications gives an aspect to this case which raises the question of whether the cumulative content amounts to undue influence or improper inducement by the employer to avoid unionization. Although we are not without our concerns in this regard, we have concluded that, in the context of such a lengthy campaign and given the amount of material distributed by the other side, the quantity of the material does not move it into illegality.

ii. Other Allegations: Interference, Inducement and Breach of the Freeze

Frequency of meetings

49. The union alleges that once the employer became aware of the union's organizing drive it increased the frequency of meetings with employees and started providing food and beverages at employee meetings. The company denies this, saying that it has always had meetings with employees and provided food, and that, in any event, it would have the right to increase meetings because of its right to free speech. We did not find the evidence generally supportive of this allegation. There was some evidence that Peter Dimichele had not been holding all the meetings he was supposed to, but it seemed to relate to meetings with the managers reporting to him, rather than with employees. The company has always had very frequent meetings with employees, and continued to do so during the campaign. There was no evidence to substantiate the allegation that food and drink had not been provided in the past. The content of the messages delivered at those meetings will be dealt with below.

The freeze vs. reduction to zero

50. It is alleged that in a number of meetings early in the campaign, Nancy Oldroyd, the Personnel Manager, told employees that if the union came in benefits would be set to zero. She denies this, and testified that what she said instead was that wages and benefits freeze and then are negotiated into a contract.

51. One of the most straightforward witnesses we heard from was employee Jeff Renaud. He said he asked Nancy Oldroyd what would happen if a union came in, and she said that they would have to have a certain percentage, and if they were successful, at that point the wages and benefits would be set to zero. He also heard this from another employee, who had mentioned Ms. Oldroyd as her source. Confused because he had heard something different from union sources, Renaud clarified the point with both the union organizer and his father, and was satisfied his wages and benefit would not be set to zero.

52. Other employee witnesses also indicated having heard from Ms. Oldroyd that benefits would be set to zero. However, Ms. Oldroyd gave uncontradicted evidence that on one occasion, she gave a specific example to an employee named Mary Harder that wages and benefits were *not* set to zero. The example was that if she had a prescription to claim under a benefit plan she could still claim it during the freeze.

53. Four months into the campaign, Ms. Oldroyd's clerk, Natalie Floro, still held the view that benefits went to zero, which she expressed to Joe DaFonseca, a union supporter, on August 6. He corrected her on this point.

54. Other evidence indicates that on September 25, after the two certification applications had been filed, the receiving manager, Mike Harvey spoke at an employee meeting and said that because of the union, employees had zero benefits and mentioned changing hours of work. Carmen Gill, a union supporter, was angered by this remark, and responded that if employees had zero benefits it was not because of the union but because of the company.

55. We have concluded that it is likely that Ms. Oldroyd and Mr. Harvey, as well as non managerial employees, did at least on some occasions say words that were understood as that benefits would go to zero. It is also possible that employees misunderstood Ms. Oldroyd, and that their misunderstanding came from her point that terms and conditions of employment had to be negotiated with the union, working from ground zero, so to speak, in terms of a collective agree-

ment. Confusion about the meaning of the freeze provisions is not hard to come by, even among lawyers.

56. However, we are of the view that we have insufficient basis to discount the evidence of witnesses such as Mr. Renaud, who gave evidence in a more forthright manner than Ms. Oldroyd. Although company counsel strenuously attacked the credibility of Ms. Gill, in the face of no evidence to the contrary, we accept her evidence about Mr. Harvey's statements as well. Ms. Floro acknowledged saying she believed benefits went to zero.

57. The question relevant to this decision is whether these statements were the result of management's delivery of misinformation in order to interfere with the union's campaign. We have concluded that a violation is not made out on these particular facts. We have no indication that Ms. Oldroyd, Mr. Harvey or Ms. Floro intended to misinform or interfere with the campaigning. And we have concluded that on balance this incorrect information did not likely interfere to any great extent with the union's campaign. The above people were not the only source of information on this, as some employees had heard of the freeze from friends, family, or the union's organizers and written material. As well, employees did not lose any benefits during the campaign, or afterwards, something that should have spoken clearly. As well, it is clear that employees such as DaFonseca corrected this idea when it was expressed.

The company's position that employees do not need a union

58. The evidence is clear that managers including Ms. Third and Ms. Oldroyd regularly communicated orally the idea that management did not think employees needed a union because of the company's open door policy, a position also communicated in the memos and letters to employees distributed throughout the campaign. Ms. Oldroyd seems to have taken every opportunity she found in conversation with employees to make her points in this regard. Nonetheless, we find what she said to be within the bounds of employer free speech, as discussed above.

First names only

59. During the organizing campaign, the company stopped using employee last names in a warehouse newsletter, on work schedules and on time cards. The company says that employees were accusing the company of giving names and addresses to the union. Company counsel argues that there is no requirement for the company to assist the union by listing last names, and that there was nothing wrong with taking last names off. It is argued the company was trying to protect employees' confidentiality and action was taken on a province-wide basis.

60. The union argues that Jean Third admitted that part of the reason for using first names only was to not make it easy for the union, an acknowledgement that it was intending to hinder the union effort. Union counsel says there is no evidence to support the company's assertion that it was because of London employee requests about confidentiality that they did this.

61. It is clear on the evidence that management was partially motivated by a desire to make things more difficult for the union, which in our view amounts to an action taken with an intent to interfere in breach of section 65. While the evidence indicates there were some employee complaints, there were other ways to counter the suggestion that the company was giving the union names, and the timing indicates the campaign was the reason for the change. Although it may not have had a major impact on the campaign, we are not persuaded it was without its effect.

Solicitation for the union on company property

62. It is alleged that in August 1992, a loss prevention clerk and two managers interfered with the union organizing campaign by telling Winnie Campbell that soliciting was not allowed on company property.

63. The various accounts of this incident were quite consistent with each other. Mr. Martin, the loss prevention clerk, during a routine perimeter check of the property, saw Winnie Campbell who was on scheduled vacation, in his car with another employee. Mr. Martin went over and said, "Just checking on you guys", and noticed that there was union literature in the car. He reported this, apparently immediately, to his superior, Joseph Campbell. Mr. Martin said his understanding was that there was to be no soliciting of any kind on company property. Although he had never been told to report soliciting to management, he felt he should report this because it was against the company policy. Mr. Martin was later himself engaged in asking people on the property to sign a petition opposing the certification of the union; he says the difference is that he had no pamphlets at the time, while Winnie Campbell had pamphlets in the car.

64. When Mr. Martin's supervisor received his report, he and Winnie Campbell's supervisor, Nancy Dewar, went out into the parking lot. Ms. Dewar said something to Winnie Campbell to the effect that she had heard he was selling something on company property. Joseph Campbell said, "Yeah, union stuff," to which Nancy Dewar retorted, "maybe not union stuff, but other stuff", and she did not want him selling or soliciting anything on the property.

65. There was no evidence of any behaviour on the part of Winnie Campbell or the other employee in the car, other than the presence of the union pamphlets, which caused this intervention by supervision. Joseph Campbell, if not Nancy Dewar, was clearly motivated by a concern that they were soliciting for the union when he approached the car, as was Bernie Martin when he reported it. Nor is there any indication that there was any rule against employees being on company property when on vacation, or off duty. There was evidence to the contrary, indicating employees are allowed to shop at the warehouse, and that employees came into discuss the union with management on their days off.

66. The company argues there was no breach here; Winnie Campbell was not disciplined. He was merely spoken to in a situation where he had no right to be there, since this occurred prior to Bill 40's becoming law in January, 1993.

67. The union argues this should be viewed in the context of the fact that he was on vacation and in the parking lot, rather than at work or in the warehouse.

68. An incident with Joe DaFonseca in February, 1993 is related in theme. It is alleged that Joe DaFonseca was told by the new warehouse manager that he was not allowed to talk about the union on company property. Ferland says he only said that one could not talk about the union during working hours.

69. It appears that some managers and employees thought there was a rule that would prohibit organizing for the union on company property, even on non-work time. But this was not universal. Nancy Dewar's remark to Winnie Campbell that maybe he wasn't selling union stuff, seemed to indicate that she thought she should not be relying on "union stuff" to caution Winnie Campbell. Nancy Oldroyd, the Personnel Manager, repeatedly told employees that they were free to vocalize their views for and against the union, and gave no direction that it was to be off company property. And it is clear that employees were regularly discussing the union, for and against, throughout the warehouse and grounds. We see no magic in Winnie Campbell's possession of pam-

phlets. It would be, in our view, solicitation with or without pamphlets, as was Bernie Martin's activity concerning the anti-union petition. The evidence leads us to conclude that a lot of solicitation for and against the union went on on company property, with the knowledge of management, without sanction. Despite this general situation, employees stationed by the roadway into the parking lot soliciting signatures for the petition against the union were told by the security guard to make sure they were off the property. And there was evidence of managers intervening to prevent or break up discussions of union matters on work time.

70. Section 72 of the Act, which existed prior to Bill 40, provides as follows:

72. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union.

Part of the Bill 40 amendments, which came into effect in January, 1993 was section 11.1(2) which provides as follows:

11.1-(2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. Attempts to persuade the employees may be made only at or near but outside the entrances and exits to the employees' workplace.

71. Long before Bill 40, the Board dealt with no-solicitation rules in the manner set out in *The Adams Mine, Cliffs of Canada Ltd.*, [1982] OLRB Rep. Dec. 1767. Section 72 does not authorize nor does it prohibit soliciting during working hours. An employer who enforces a no-solicitation rule that has the effect of preventing employees from soliciting on behalf of the union will be found to have improperly interfered with the union drive, unless it can show that it was doing so to preserve property, prevent serious disturbance, or to ensure productivity or safety. See also *Sobeys Inc.*, [1993] OLRB Rep. July 675.

72. We are of the view that although Winnie Campbell was not formally disciplined, he was warned against soliciting for the union on company property. Joseph Campbell and Bernie Martin were, on the evidence, enforcing what they believed to be a rule against such solicitation on company property. There was no indication that there was anything even remotely disruptive about what the two employees were doing in the car. We are of the view that there was no regular application of the company's no solicitation rule to conversations about the union, for or against. However the incident with Winnie Campbell was an exception, which we find was a breach of section 65. We are not of the view that the fact that section 11.1(2) was not yet law means that Winnie Campbell had no right to be on the property on his vacation when it is clear that other employees were regularly allowed on the property when they were off duty for a wide variety of purposes.

73. Whether Andre Ferland was similarly warning Mr. DaFonsecas is less clear. We found both Mr. Ferland and Mr. DaFonsecas to be straightforward on the stand, and it is difficult to tell which of them is mistaken in his recollection, although one of them must be. On balance, we have concluded that it is unnecessary to resolve the conflict in their evidence, as it would not add in remedy to the consequences of what we have found to be a breach in the situation with Mr. Campbell above.

Terminations of 2 supervisors

74. Natalie Floro is the clerk in Personnel, excluded from the bargaining unit as in a position confidential as to labour relations. She was on friendly terms with Joe DaFonseca, a vocal union supporter. In the same conversation referred to above which included references to benefits

going to zero, Ms. Floro admits questioning him about who signed for the union. Mr. DaFonseca told her that was confidential and did not give her the information, but told her that the union was close to having sufficient numbers to get in. Mr. DaFonseca also told her during this conversation that he was fed up with his front end supervisors, Derbyshire and Moody.

75. The following morning, August 7, 1992, Ms. Floro passed on Mr. DaFonseca's comments to her manager, Nancy Oldroyd, the personnel manager. She in turn told the warehouse manager, Peter Dimichele about this on August 7. Later the same day, Ms. Oldroyd heard from Ms. Third that the two supervisors about whom DaFonseca had complained were being terminated. Ms. Oldroyd in turn let Ms. Floro know this late on the 7th when she called her at home to let her know what to expect for the following day as she was not going to be in. Ms. Floro saw Mr. DaFonseca at a baseball game that evening as well, and according to her testimony, in a generalized attempt to cheer up Mr. DaFonseca, encouraged him to go to work tomorrow and be happy. She testified that it was before she heard from Ms. Oldroyd that the two were going to be terminated that she made this remark to Mr. DaFonseca. Mr. DaFonseca says the comment was much more specific, that Ms. Floro told him that something would happen at work to make him happy, at that then he could come see her. When he went to work the following day, he learned of the termination of the two supervisors of whom he had complained, and concluded that Ms. Floro had been telling him this would happen when she made the remark at the ball game. In our view, in the final analysis, little turns on whether Ms. Floro knew before or after her remark to Mr. DaFonseca. It was acknowledged that the information about Mr. DaFonseca's complaints reached the ears of the managers who fired Ms. Derbyshire and Moody. It is the use of that information which is the more important issue for this case.

76. Jean Third testified about the terminations, which were her decision at Peter diMichele's request. She acknowledged that complaints about favouritism, which included comments to the effect that these supervisors were harder on union supporters, were part of the reason they were terminated, but explained that they had already been on probation for a number of months. She said there had been no discussion in management about weakening support for the union by terminating these people. The evidence is unclear as to whether she had heard Mr. DaFonseca's comments about the union being close. The timing of these terminations the day after Mr. DaFonseca's complaint was not specifically explained although Ms. Third said their unsatisfactory performance was a subject of discussion throughout the summer.

77. The company argues that the statements of Ms. Floro, a clerk with no managerial authority, cannot support a section 8, that this is one rank and file employee chatting to another. The company did not ask the questions about union support, and they should not be held against the company, in counsel's submission. By contrast, the union argues that not only is Ms. Floro in a confidential capacity; she lives with a supervisor. As to the terminations of Derbyshire and Moody, company counsel argues that they cannot be contraventions of the Act because they were not exercising rights under the Act, as they were not employees under the Act. The union argues that this is part of the company's solicitation of complaints and fixing them in a manner the Board found to be illegal in *Globe & Mail*, [1982] OLRB Rep. Feb. 189. They underline that these were the first two of what was to become four terminations in a little over two weeks.

78. Usually it is discharges of union supporters which are pleaded to be breaches of the Act. The unusual circumstance of this aspect of the case is the allegation that a termination of managers was used as an inducement to employees to stop supporting the union because it demonstrated the employer's willingness to solve problems without the intervention of a third party. We will deal with this issue together with the other allegations about Ms. Third's August interventions below.

Price Club has its own rules

79. It is also alleged that on August 11, Nancy Dewars, a supervisor, during a regular meeting with the employees in her department, made reference to the union and said Price Club has its own set of rules. Having heard the various accounts of this incident, we are convinced that it was not a contravention of the Act. When an employee said words to the effect that, "If the union comes in, nothing that Price Club has given you can be taken away", she responded, "Oh, I don't know about that," and that Price Club had its own rules. The employees had raised issues about the union; it is clear that she was attempting to be non-committal.

August 14 meeting with Jean Third

80. On August 14, 1992, Vince Gentile, a union representative, advised Ms. Third that an unfair labour practice complaint was going to be filed dealing with the Darnell discharge. That same day, she held a meeting with six employees, which the union alleges was for the purpose of soliciting problems from known union supporters to convince them they could be dealt with without a union. Ms. Third said that she had not chosen the people to attend, but earlier in the week had asked her managers to send people who would speak their minds. This resulted in over half the employees in attendance being known union supporters. As to the allegation that the purpose of the meeting was to demonstrate that the employees did not need a union to solve problems, she said that all the meetings are for the purpose of showing the employees that the issues they raise will be solved and quickly.

81. In the course of the meeting it is clear that the Darnell discharge was raised by employees, and that Ms. Third said she would look into the rumour that no cigarettes were missing. Employees spoke their mind about various supervisors, and she may have told them the company was planning training for them. She says she may have said that Price Club did not believe that the employees needed a union. However, in general she tried to avoid discussing the union, so as not to say anything that would be misconstrued.

82. The union argues that what is unusual about this meeting is that it is the first meeting Jean Third had at the London store by herself with employees. Secondly, the selection of people to attend was unusual. There are regular meetings with other managers, but not with Third, and the evidence is that employees attended on a rotational basis. Here certain employees were directed to attend. Normally the warehouse director would have been present but this time he was not.

83. The union sees this meeting in the context of Jean Third, a senior manager, coming in to "clean things up" at a critical time in the union campaign. James Paddison testified that things were better in the warehouse after this, that problems were solved, and the campaign slowed down. He clearly saw the meeting as an attempt to demonstrate to employees, in particular union supporters, that problems could be solved without a union.

84. The company says that, given the evidence that the company knew about the campaign in April, this meeting has to be seen in the context of 4 1/2 months of no clean up. Ms. Third was always in the London warehouse on a weekly basis, and had sat in on meetings with employees before. This was also the last day the warehouse manager worked; he went on vacation the following week, during which Jean Third managed the warehouse. He was fired upon his return from vacation on August 24, and Ms. Third acted as warehouse manager until his replacement arrived in the early fall. On August 28, the application for certification in the full-time unit was filed.

85. We are not persuaded that the holding of the meeting itself should be considered an inducement to the employees to abandon the union. The only unusual aspect of the structure of

the meeting is that the warehouse manager was not present. In the context that she was about to become the acting warehouse manager this is less remarkable. However, it is clear that by this time Ms. Third had concluded that the London warehouse necessitated attention and action. She had in less than two weeks been asked to authorize three terminations, one for theft and two for problems which included complaints of favouritism to anti-union employees. She had on August 7, the same day she authorized the terminations of Derbyshire and Moody, issued an extensive question and answer memo dealing with union and job security issues. She issued another memo dealing with job security on August 13 shortly after Darnell's termination. The August 14 meeting which had been planned early in the week after the Derbyshire and Moody terminations, followed the termination of Darnell by only a few days. We have found that the Darnell termination was not illegal. The Derbyshire and Moody discharges, although not of bargaining unit employee, became part of the general turmoil in the warehouse which was also being fed by the division among the employees over the union campaign. The question to be decided is whether the company's response to the problems in the warehouse was motivated by its expressed preference to remain union-free, and if so, whether it exceeded the bounds of section 65 in doing so. The company's response also included in the union's submissions, the discharge of the warehouse manager and the promulgation of a new discipline policy, which it is appropriate to address as part of this sequence.

Dimichele's Termination

86. Jean Third testified about her decision to fire the warehouse manager Peter Dimichele on August 24, 1992. Problems with his performance had been identified a year earlier, when she started in her position as Ontario Operations Manager. His difficulties included how he managed managers, his style being too autocratic. Ms. Third had a serious meeting with him in August, 1991, at which point he said he would try to improve, but Ms. Third concluded he did not totally agree there was a problem. His pay raise did not go through in January because of a tough evaluation, an unprecedented move. Then there was a two to three month review date, at which point he had shown some improvement and Ms. Third put his salary increase through. Then in late spring and summer, she found out Mr. Dimichele was not necessarily holding meetings he said he was, or should have been such as meeting one on one meetings with his own managers. It had also taken him too long to hire an assistant manager. Because no assistant manager had been hired yet, she decided to spend time at the warehouse while he was on holidays the week of August 16 to 21, 1992. She found out that policies had not been followed, and important supplies had not been bought to cut costs. Senior management decided this was a deterioration in performance that warranted dismissal. Ms. Third resisted the suggestion that on the last day of Mr. Dimichele's work she met with union supporters to try to convince them that real change can happen without a union, and then fired him to show that she meant it. For instance, she testified that those employees did not have complaints about Mr. Dimichele. The union pleaded to the effect that he was fired because he was not anti-union enough for the corporation.

87. Essentially the Board's task is to determine if the employer's actions throughout the campaign, and concentrated in the three weeks preceding the union's application for certification in the full-time unit, were motivated by a desire to interfere with the union campaign. The problem from an analytical perspective of course, is that everything a corporation does in its own interest during an organizing campaign can be seen as interference with the union campaign. Any exercise of managerial prerogative is a demonstration of an employer's power over the economic lives of its employees. Use of employer power is also consistent with a message that that very power can be used against individuals acting in a manner not considered to be in the best interests of the employer. In most cases of this kind which come before the Board, and this one is no exception, employers do not see unionization as in their interest. Employees seldom miss that fact, and it is clear that Price Club employees were no less able than any others to get the point. The problem of

sorting out motivation of events that are consistent both with the employer's interest as it would exist at any time and with its expressed desire to remain union free during a campaign is uniquely well framed in this case by the range of allegations about the three managerial discharges. It is alleged to have been illegal to fire managers perceived to be acting in an anti-union manner (Derbyshire and Moody) and the one who was allegedly "soft" on unions (Dimichele). And the facts of this case would be complex even without the somewhat unusual element of an allegation that firing managers is anti-union. That is because the company had in place, long before the union campaign, a system of regular meetings for the express purpose of soliciting and resolving employee complaints and grievances. In this respect this case is quite unlike *Globe & Mail*, cited above, where the Board found that *unprecedented* solicitation of employee grievances together with a "blank cheque" response to fixing them during a union campaign violated what is now section 65 of the Act. However there is a similarity to *Globe & Mail* in that the fact that although all three managers were on probation, the decisive action did not happen until the union campaign had gained momentum and was seen as having potential for success. In *Globe & Mail*, problems had been identified before the campaign, but little had been done to correct them.

88. The company says the timing here is not suspicious; the campaign was into its fifth month when these decisions were taken. The union points to Mr. DaFonseca's August 6 communication to Ms. Floro that the union was "close" as an indicator that the employer's actions were surely aimed at the union, as well as what was likely a chronic managerial problem at the warehouse.

89. The timing of the Derbyshire and Moody terminations immediately after Mr. DaFonseca's complaints were relayed to senior management warrants the inference that this complaint was the last straw. However, the fact that the operative part of the problem with these managers was a preference for anti-union employees cuts in both directions on the question of motivation. And we do not believe it cuts equally. We find that it is somewhat more probative of an attempt to remain even-handed in its treatment of the factions for and against the union than it is of an attempt to thwart the union campaign. In saying this we have considered carefully Ms. Third's level of sophistication. Her approach was nuanced and we are acutely aware of the potential of a fist inside the velvet glove, a problem explored at length in *Globe & Mail*. Having weighed all the factors including her straightforward demeanour in giving evidence, we have come to the conclusion that her motivation was within the bounds of the law.

90. On the question of the discharge of Dimichele, the timing is also ambiguous. The reason Ms. Third found herself in the London warehouse during Dimichele's vacation was one of the reasons she found his performance inadequate: he had not gotten around to hiring an Assistant Manager who could have replaced him. There was no allegation that the timing of the vacation was suspicious. Once installed for the week, it appears Ms. Third concluded that Mr. Dimichele was beyond rehabilitation. This view of the timing is not a cause for concern.

91. The alternate view is of concern. That is that Ms. Third was "cleaning house" in a rather dramatic way as part of a pervasive campaign to undermine the union campaign. On this view of the facts, the minute she heard that the union had enough support to be "close" she reactivated the company's campaign which had already included numerous memos aimed at the union. (There was no evidence of any public employer response between putting out the question and answer box in early June, and the publication of its response to those questions the day of the terminations of Derbyshire and Moody).

92. Although the union pleaded that Dimichele's comments to Mr. DaFonseca that he did not care if the union came in as long as sales stayed up explains his discharge, the evidence is not

persuasive that that comment figured in Ms. Third's decision to fire Dimichele. There was no evidence she had heard that remark. But even if she had, or she thought Dimichele was not anti-union, there was no evidence to contradict her reasons for firing Dimichele.

93. Turning to the reasons given, we have concluded that Ms. Third found the London warehouse to have problems which Mr. Dimichele had failed to solve. That she thought the union campaign was one of many symptoms of that is likely, although there is no direct evidence of that. Ms. Third's view of Mr. Dimichele's inadequate performance predated the union's campaign, and we have no reason to doubt its sincerity. The only issue for decision here is whether the firing was an act of interference in the union's organizing drive. The timing lends force to that argument. However, timing is not all. The evidence does not persuade us that Dimichele's termination would have been associated with the union in the employee's minds. Even those who testified that they felt Ms. Third's August 14 meeting was an attempt to solve problems without the union did not link the warehouse managers to the same line of thinking. The line of reasoning by which the Dimichele discharge would become illegal if it can be considered a promise or illegal interference under section 65. This is not a case like *AAS Telecommunications*, [1976] OLRB Rep. Dec. 751 or *Royal Shirt*, [1993] OLRB Rep. Nov. 1177 where managers were associated in employees' minds with the union and thus their discharges carried a strong anti-union message.

New disciplinary policy

94. It is alleged that during the campaign, employees were told disciplinary records would be cleared and a new system introduced. Company witnesses gave the context for this: starting in November, 1991, managers were engaged in a process aimed at achieving consistency throughout the province on the specifics of the discipline policy. A draft of revisions to the policy was developed by May, 1992, and further revisions were done in June and July, which became effective August 19, 1992.

95. As to the allegation that employees were told that their discipline records would be cleared, Ms. Oldroyd testified that there was discussion among the London managers that when the new policy came into effect, managers were to review discipline records to see if they were in conformity with the new policy. As a result of this, revisions to three files were made to change references to verbal warnings to the new terminology of corrective consultation. She says they also told managers they could tell employees they could view their personnel files, although a substantial majority of employees had nothing on their records in any event.

96. The August, 1992 version includes much more detail than its predecessor, the March, 1992 version. It appears aimed at managers, as it contains information on how to conduct corrective consultations, a term that was also used in earlier policies. A suspension step is added, a twelve month limit for verbal and written warnings that was in an earlier version is not mentioned, and examples of what infractions should attract what penalty are given. The basic structure, that of a progressive discipline policy, is unchanged. The March, 1992 version of the discipline policy had a paragraph on sexual harassment policy and a time limit for warnings which were not present in the one dated March, 1991.

97. Several employees gave evidence about what they recalled being told about this issue. Their recollections varied, as did their managers. Weighing the various accounts, it seems clear that a number of employees were told that discipline records would be cleared under the new system, but there were qualifications, such as that people with repeated warnings would not be affected. Others were merely told there was to be a new system, or that new terms would be used for warnings.

98. The company argued that even if managers said that the records were going to be cleared and that is found to be illegal, it was so long ago, it would have no impact on a vote. By contrast, the union argues that the discipline policy was put out at a critical time in the campaign, after three firings and the meeting with Jean Third and shortly before the firing of Peter Dimichele. It is our view that the timing of the release of the revised discipline policy is likely related to Ms. Third's attempts to reassure people after the August firings, attempts which had included two earlier memos underlining that Price Club only terminated for cause and usually after a discipline process, with opportunities for employees to correct their behaviour. The issue is whether the timing of the release, together with statements to employees that their records would be wiped clean was an inducement. At least one of the managers' remarks was just shortly before the deadline for the petition opposing the union. It is argued that the promise was for the purpose of getting people to sign the petition.

99. On balance, the evidence is not persuasive that the release of the policy in the midst of the campaign where it had been amended before as recently as March, was not at least partially intended as a promise that there would be a fair discipline policy even without the union. The issue of consistency of discipline was a live one during the campaign and it seems clear the company's interest in promising a new system was aimed partially at interfering with the campaign. Thus we find that the promulgation of the policy and the offer to wipe records clean was in breach of section 65.

Remarks by Kirk Mair

100. On August 26 a supervisor named Kirk Mair is alleged to have told employees that if they were approached by the union they should say that it's company time, as well as to have asked employees why anyone would want to pay a union \$325 a year for nothing. Mair did not deny making a remark to that effect but said it was prompted by an employee, who did not give evidence, saying that he was having trouble working because people were interrupting him to talk about the union. The subject of the union came up because of this and another employee expressed concerns about not feeling he could go to his supervisor with his problems. Mair emphasized the company's open door policy, and expressed the view that it was better than waiting months for a union grievance procedure to come to a conclusion.

101. Although employee witnesses versions differed somewhat, it was not in a manner which changes the thrust of the remarks. This is a situation in which a manager made remarks which clearly indicate his opposition to unions. However, there was no linkage to threats to job security, as in *Sobeys Inc.* [1992] OLRB Rep. Sept. 1020, and we are persuaded that these remarks fall within the ambit of employer free speech.

Allegations about change of hours

102. Coincident with the union campaign, there was an issue in the merchandising department about the hours of work and whether they could be changed. Employees were divided on the issue and there was much discussion about it. It is alleged that when one of the employees spoke to Jean Third about this issue, on September 4, she said the union had put a freeze on company policies, wage increases and schedules of work and that the company was not allowed to change hours of work. This is complained of in the context that a few weeks earlier she had not seen a problem with changing the merchandising start time from 4:30 to 6:00 a.m. Ms. Third testified that what she would have said about the freeze was that conditions of work, and salaries outside of what we normally do, was what was covered by freeze. She said she never contacted the union about hours of work because she never took the decision to change hours. We find this unobjectionable under the Act.

A newspaper article

103. On September 3, a newspaper article concerning wage cuts agreed to by UFCW at a company known as Trillium Meats was posted on the employee bulletin board, by someone in management. Company counsel refers to a newspaper article distributed by the union saying that it got a good contract at A & P. There is nothing wrong with that, but why then should it be illegal for the company to put up a newspaper article about a not-so-good contract, queries counsel. The union sees this as part of the company's ongoing anti-union campaign.

104. We are of the view that posting the article did not go beyond the company's right to express views set out in section 65.

The Roadshow

105. On October 1, 1992, there was a meeting of employees with senior staff of the company, referred to by various witnesses as the "Roadshow". It is alleged that employees were told that management people were losing a lot of sleep over the union, that the company was looking at a 5% wage increase for November 1, and that various ergonomic improvements would be made in the cashiers' work area. As well, it is said that the managers said that Price Club was very generous to its employees, was hiring full-time employees while certain competitors employed mostly part-time people, that Price Club planned to expand, and that Pierre Mignault, the Canadian president, would answer questions about the union after the meeting. Various witnesses remember the meeting slightly differently. Having weighed all the evidence, we have concluded that something quite close to what is alleged was said. We also note that Jean Third's evidence that roadshows are held about twice a year was not contradicted. Nor was there any evidence that the type of topics addressed - company values, planned improvements, and upcoming wage reviews - were out of the ordinary. We have concluded that this meeting cannot be considered something designed specifically to deal with the union campaign, although it is clear that the campaign found itself on the agenda. Ms. Third testified that no one gave the figure 5% as a contemplated increase; rather she believed it had been a reference to a 5% increase given the two previous years. Her evidence, which we accept, indicates that the company did not make any specific promises, but gave a review and update on what had been occurring elsewhere in the Price Club organization, including expansion plans.

106. The union argues that all through the campaign the company told employees that their wages are frozen, and gave no indication they would get a regular wage increase until the roadshow.

107. The aspect of this meeting which aimed at improving employee morale and identification with the company's goals is unobjectionable. The issue to be decided is whether the reference to the stress engendered by the union campaign, the invitation to ask the company president questions about the union at the end of the meeting and/or the references to planned improvements in wages and working conditions are illegal.

108. We are of the view that nothing said in the meeting crosses the line into undue influence. We have concerns about the solicitation of questions about the union, in the context of the Board's concerns about soliciting grievances set out in *Globe & Mail*, referred to above. However, there was no allegation about, or evidence of, the content of any conversation in response to Mr. Mignault's invitation, and thus no basis for a finding of illegality in that respect.

Freeze provision complaints

109. Certain company initiatives which occurred after the applications for certification were filed are also alleged to breach section 81, known as the freeze provisions.

110. On November 7, 1992, wage increases ranging from 3 to 7%, were announced, together with a regrouping of a number of employees to a higher wage level, and a lump sum bonus to be paid at Christmas. With the exception of the regrouping of callers and cashiers into a new classification, front-end clerk, these changes were without the consent of the union. These increases followed an October salary survey which the company had been doing in Ontario for 5 years, resulting in uniform wages in the Ontario warehouses. The survey showed that some competitors had increments for service that Price Club did not, so they added a further increment. The lump sum, a new feature, was also determined at the time of the October review. Ms. Oldroyd testified that she understood the lump sum to be an equalization of the wages for full-time employees across the year. It was not given to part-time employees because their wages were competitive throughout the year. There was no explanation of why it was formulated as a Christmas bonus.

111. The company acknowledges that the wage increases were done without the union's consent but argues that it was normal practice. The union says it was a very generous wage increase and a lump sum payment which had never been done before. Besides, the material accompanying it refers to collective agreements with less of an increase.

112. The union also complains of a change of start time in the receiving area from 7 a.m. to 6 a.m. without the agreement of the union. Ms. Third's uncontradicted evidence was that this was the usual practice prior to Christmas time across the province and therefore she felt there was no need to consult the union.

113. The purpose of the freeze provisions is to ensure that following the filing of an application for certification and during the period required by the Board to resolve the issues relevant to the application, no interruption will occur in the existing employment relationship which may influence employees with respect to representation by the union. See *Beaver Electronics Limited*, [1974] OLRB Rep. March 120 and *Molson's Brewery (Ontario) Limited*, Toronto, [1977] OLRB Rep. August 526. It is clear that the pre-existing employment relationship here included an October wage survey with increases implemented before Christmas. The extent of the wage increase given in November, 1992, although generous in relation to comparators, was not shown to be such a departure from the previous pattern as to constitute a breach of the freeze. The lump sum bonus given at Christmas is another matter. While the decision to give it was made at the same time as the general wage increase, there was no evidence that persuades us that it was part of the previous pattern of dealing with remuneration. The memo announcing the wage increase, including the bonus, makes reference to collective agreements with small increases and many companies' giving none at all. The rationale for the bonus was not explained persuasively.

114. Further, in the context of the memo provided and the entire sequence of events leading up to this, we are not persuaded that the giving of the bonus was free of anti-union animus. See *Anderson's City Farm Valu-Mart*, [1987] OLRB Rep. January 1; *Globe & Mail* cited above; and *Knob Hill Farms*, [1987] OLRB Rep. Dec. 1531.

Monthly Award

115. The union says the company eliminated a \$25 monthly award. Nancy Oldroyd gave uncontradicted evidence that this award was just redeployed; it was not eliminated. Since January,

1992, each department has decided what to do with its own award, such as go out to lunch or use it as an award. There is nothing objectionable in this under the Act.

Cafeteria Video

116. The company agrees that starting in early March 1993, the company played a video in its cafeteria, lasting about five minutes on a continuous basis. In it, the Director of Human Resources explains why it is that the Union is allowed on company property and states that if employees feel pressured or harassed, they should speak to the warehouse manager or area manager. The tape also purports to explain how the Union obtained employees' home addresses - from licence plate numbers, time cards and schedules. Evidence indicated that this was the first time a video had been playing continuously in the cafeteria, although videos have been shown during orientation and seminars.

117. Although unprecedented, there is nothing coercive in the message delivered, as pleaded. We have concluded it is within the bounds of employer free speech.

Allegations of discrimination - DaFonseca

118. The union alleges that on April 15, 1993, Andre Ferland called Joe DaFonseca, a vocal union supporter, to a meeting, and told him he had a severe attitude problem, that if he wanted to play hardball, Mr. Ferland could play hardball too and would use the discipline process. Mr. Ferland admits he sent for Joe that day, over a parking problem. Mr. DaFonseca had repeatedly parked his car in an unauthorized location where he thought it was safer from vandalism than in the employee area. The meeting in question was prompted because it was the seventh or eighth time Mr. DaFonseca had been spoken to about this. Mr. DaFonseca said he was being picked on and Ferland disagreed. Mr. Ferland agrees he got mad because Mr. DaFonseca continued to argue a point that he thought should be very clear. Mr. Ferland did not discipline him, although he acknowledges telling him if he wanted to play stupid or hard ball, he could do it too.

119. Mr. DaFonseca acknowledged parking in the wrong place, but seemed to feel that others were allowed to do so when he was not, and that he was justified in parking where he wanted because of vandalism and notes of both a prank and threatening nature that had been left on his car. However, he declined to give names to Mr. Ferland of who was being allowed to park in unauthorized locations.

120. We find nothing objectionable under the Act in this meeting. Support for the union does not insulate an employee from criticism for failure to comply with rules, including parking rules. We have no persuasive evidence that Mr. DaFonseca was being singled out in a discriminatory way. He was spoken to in a formal way after repeated infractions, and was not written up. That Mr. Ferland became annoyed at what he saw as Mr. DaFonseca's argumentative behaviour, is not something we find had anything to do with Mr. DaFonseca's position on the union, on the evidence before us.

121. Similarly we are unpersuaded that Mr. DaFonseca was being discriminated against or picked on for his union views when a manager told him not to use a washroom which was being cleaned or spoke to him about a hat he was wearing.

Unsubstantiated Allegations

122. Certain allegations had no evidence to support them. These include the allegation that Nancy Oldroyd had said that unions were "real bad", that the personnel clerk told an employee

who had come to pick up a pay cheque that she hated a key union supporter because he had brought in the union, that on August 6, a supervisor named Smibert told an employee named Lee Baker the names of two union supporters whom she accused of soliciting for the union, and that anti-union remarks were made to an employee named Alan Carr by two managers.

The section 8 application

123. By the time this matter came on for hearing, Section 8 had been replaced by section 9.2, but it was common ground that this case falls to be determined under the previous legislation. The former section 8 provided that:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

124. The union summarizes by saying that even apart from the Darnell discharge, the company made its opposition to the union clear, encouraged employees to refuse to deal with the union representatives, encouraged signing of the petition, made various attempts to improperly influence employees, by making promises about virtually everything that concerned employees: Sunday premiums, wiping disciplinary records clean, firing supervisors about whom a union supporter complains, sending supervisors for training. They collect the union organizers during a critical period and promise to deal with their concerns. As well, managers emphasized everything was frozen or zero throughout the campaign, and then the company gave an unprecedented increase. The explicit message was you're doing fine here; all the union wants is your money.

125. The union alleges that the cumulative effect of the company actions said to be in violation of the Act is that a situation now exists where the true wishes of the employees is not likely to be ascertained, and that the level of support for collective bargaining is adequate for certification. The union organizer Rick Waukhonen testified that after the four terminations in August, it became increasingly difficult to get employees to talk about the union, and that the cards that were signed after that were the product of much greater investment of time and effort by organizers. Once the idea spread that there were no cigarettes missing after the Darnell discharge, some employees became fearful for their jobs. Jean Third acknowledged in her evidence that the staff were very upset and anxious after the terminations.

126. The union argues that the fact that the union was still able to sign up cards although with difficulty is not evidence that the company's actions had no effect, but is a testament to the strength of the support for the union. Whether without the company's conduct the union could have gotten majority support in both units will never be known, but that is because of the company's conduct, and that is what section 8 is for, submits counsel. The union referred to *Beaver Lumber*, [1992] OLRB Rep. May 553 for the proposition that if it is impossible to assess whether or not the campaign was naturally spent, rather than chilled by the employer's actions, the doubt will be resolved in favour of the union where that is one of the effects of improper interference by the employer.

127. The union says that the effect of the violations has not been spent and that the delay in litigating this matter plays into the company's hands, rather than the union's. Union counsel acknowledged that the company's approach was not heavy handed, and often couched in terms of pro-choice. Nonetheless, the message got through. The union sees the company's response to the

organizing effort as a sophisticated and pervasive one, which included firing four people at a critical point in the campaign.

128. By contrast, the company argues that there has been no contravention of the Act, but that even if there had been, the fact is that the campaign was not affected by the employer's actions in firing the four people. In the month of the discharges, August, the union signed up 15 full timers, 10 after the Darnell discharge, which is a better rate of progress than in either of May or July. The company argues that this was a 4 1/2 month old campaign with people outspoken on both sides. There were simply two camps, the organizing effort was arduous all the way, and the union made what progress it could. The Board is urged to find that there is no support for the chill allegation.

129. We have found that the company did not violate the Act in discharging Ken Darnell, or three managers, and that a number of other allegations are not established. However we find that it did violate the Act in telling Winnie Campbell he could not solicit for the union on company property, promising to clear discipline records, removing last names and offering the Christmas bonus to employees partly as an inducement to avoid dealing with the union, and thus interfered with the union's organizing drive.

130. However, are not of the view that the violations found above are so serious that the true wishes of the employees cannot be ascertained, if other remedies are put in place. Nor is the evidence that the campaign was chilled significantly clear. For instance, the rate of card signing did not drop after the discharges and when presented with the opportunity to change their minds and sign a petition, only a handful of union supporters did so. However, we have not heard the case on Board File No. 2124-93-U which contains allegations which the union argued were potentially relevant to its application under section 8. We hereby direct that the parties address the Board in writing within ten days as to their position on whether we should finally determine the section 8 application before hearing that matter. We remain seized as to all remedial matters.

131. Board Member D. A. Patterson dissents from the above decision.

3579-92-R United Steelworkers of America, Applicant v. **Royalguard Vinyl Co.**, A Division of Royplast Limited, Responding Party v. Samuel Ofosu Ansah, Intervenor

Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *J. A. Rundle* and *C. McDonald*.

APPEARANCES: *Mark J. Lewis*, *Brando Paris* and *H. Desai* for the applicant; *Joseph Liberman*, *Dave Chondon*, *Doug Dunsmuir* and *Steve Cork* for the responding party; *Samuel Ofosu Ansah* appearing on his own behalf.

DECISION OF VICE-CHAIR, LAURA TRACHUK, AND BOARD MEMBER C. McDONALD;
August 26, 1994

Introduction

1. This is an application by the United Steelworkers of America (sometimes referred to in this decision as “the union”) to represent a bargaining unit of employees at Royalguard Vinyl Co., A Division of Royplast Limited (sometimes referred to in this decision as “the company”).

2. This application for certification was received by the Board on March 9, 1993. The company filed a response to the application which was eventually amended to include allegations that the union organizers had coerced employees with threats into signing union cards prior to filing the application. Each of the parties also filed an application under section 91 of the *Labour Relations Act* alleging that the other had committed unfair labour practices. On the first day of hearing, the panel ruled that it would hear the unfair labour practice complaints subsequent to the application for certification. At this time, those applications have not yet been heard.

3. Mr. Samuel Ansah is an employee of the company. He filed a document with the Board prior to the terminal date alleging that he had been coerced into signing a union card. The Board failed to acknowledge or address this correspondence prior to the commencement of the hearing. On the first day of hearing, Mr. Ansah advised the Registrar that he would not be participating in the proceedings. However, on the second day, he attended at the Board and advised that he wished to participate and he was then granted standing to do so. Under the circumstances, Mr. Ansah was given standing to intervene in this matter in spite of having advised the Registrar on the first day that he did not wish to, because the Board was concerned that it had failed to communicate with him in a timely manner about his obligations with respect to filing particulars, etc., and because it was concerned that he had not understood the finality of the decision he was making the previous day. As Mr. Ansah was not represented by counsel, the Board explained its proceedings to him as is its practice when parties appear before it without representation. He was given full opportunity to call and to cross-examine witnesses, as well as to present argument throughout the hearing. Mr. Ansah was accompanied throughout the hearing by Mr. Stefano Pellizzari, another employee of the company.

4. The hearing of these matters took some forty days. The evidence was completed the first week of December, immediately before the Vice-Chair commenced her maternity leave. At that time, the parties were directed to file an outline of the facts upon which they were relying, and the Board reconvened on February 21 and 25 to hear the argument. At the conclusion of the argument, the Board indicated that it would attempt to issue a “bottom-line” decision. None of the parties objected to that proposed course of action. As a general matter, it is the majority’s view that a decision should issue as soon as possible in a certification application in order for the parties to either commence their new relationship, or in the event that a certificate is not granted, to return to their former status. In this case, due to the amount of evidence and the Vice-Chair’s continuing maternity leave, the Board did not render its bottom-line decision until June 6, 1994. In that decision the majority found that the company’s allegations had not been substantiated and certified the applicant. The following are the reasons for that decision.

Preliminary Issues and Interim Rulings

5. The Board made numerous rulings during the course of this extremely long proceeding. It indicated that it would include a number of these rulings in its written decision. This section contains the reasons for those rulings.

6. On the first day of hearing, the union made a motion to have a number of allegations contained in the company's response struck on the basis that they lacked the particularity required by the Board's Rules Nos. 14 and 16. The union also claimed that a number of allegations contained in the response referred to a time period subsequent to the filing of the application and therefore had no relevance to the issue before the Board which was the reliability of the membership evidence filed with that application by the union.

7. The company's response contained an allegation that flyers stating "No union = no jobs" had been found on car windshields in the company's parking lot on Sunday, March 7 during the "A" shift which began at 7:00 p.m. The response also included allegations that one of the union organizers had threatened a number of employees on March 11, 1993 that their employment would be terminated if they did not join the union. As indicated, the union's application for certification had been filed with the Board on March 9. The response also contained the following paragraph:

6. In addition to the particulars referred to above, the Respondent submits that the following employees were also told by Tai or Hittu or Tai and Hittu during the organizing drive that if they did not sign cards in favour of the Union they would lose their jobs.

This paragraph was followed by a list of eight names.

8. At the completion of the parties' preliminary arguments on April 5, the Board issued the following ruling:

We have considered the submissions of the parties. The Board has decided that it will hear the union's certification application first and subsequently will consolidate and hear both of the section 91 applications. We have decided to proceed in this manner because upon reviewing the employer's pleadings, we have concluded that most of the allegations which have been particularized relate to a period of time subsequent to the union's application and are therefore not admissible in that application. Furthermore, the Registrar has contacted the author of the March 25 letter and he has indicated that he does not wish to participate in this hearing and will be faxing the Board correspondence indicating that he wishes to withdraw his letter. As a result, it would appear that the evidence called with respect to the certification application will be limited and there will be very little overlap with the evidence which will be called in the section 91 applications.

The author of the March 25 letter referred to in our ruling was Mr. Samuel Ansah, who attended at the Board the following day and was, in fact, permitted to participate fully in the proceedings.

9. In a certification application, the Board's focus is on the reliability of the membership evidence submitted by the union and upon which it is relying. Therefore, allegations of misconduct which relate to the collection of membership cards subsequent to the date of application, i.e., cards upon which the union is not relying, are not generally relevant to the issues in the certification application. However, allegations regarding the collection of membership evidence which is not relevant to the count for the certification application may nevertheless form the basis of an application under section 91 of the Act. The Board has been faced with allegations alleging intimidation and coercion of employees after the date the membership evidence was submitted in previous cases. In *Innovative Wood Products*, [1978] OLRB Rep. Feb. 161, it stated as follows:

18. Mr. Mancini's evidence about the threat made by Mr. DiStefan on Friday, December 2, 1977, is simply not relevant to impeach the quality of the membership evidence in the instant case. On this application for certification the question before the Board is whether the membership documents submitted by the union represent the voluntary wishes of the employees who signed them on November 18, 1977, the terminal date fixed for this application. In the instant case the threat against Mr. Mancini was made after the terminal date. Any threat or intima-

tion contrary to section 61 [now section 71] of the Act taking place after that date might well be the foundation for a complaint under section 79 [now 91] of the Act and be a possible ground for the granting by this Board of its consent for leave to prosecute. But it does not operate retroactively to cast doubt on the voluntariness of a membership document that stood as a free statement of an employee's will on the terminal date fixed in the application. There is nothing in the evidence to suggest that intimidation was used against Mr. Mancini in order to get him to sign the union membership document, nor is there any evidence to suggest that he was coerced or threatened to prevent him from filing a timely statement of objection to the instant application. A threat against Mr. Mancini made on December 2, 1977, even if it were an actionable breach of the Act, could not cast doubt on the membership documents filed in these proceedings when those documents are taken as speaking as at November 18, 1977.

10. The Board finds the considerations expressed in *Innovative Wood Products, supra*, to be applicable in the circumstances of this case. Thus, allegations of threats made to employees to coerce them to sign cards *after* the date the membership evidence was submitted, i.e., the application date, were not relevant to the reliability of that evidence. There were no particularized allegations of threats made prior to the application date. The Board therefore ruled that evidence relating to those allegations was not admissible in this proceeding.

11. The Board also ruled that evidence with respect to the allegations in paragraph 6 of the company's response quoted above was not admissible, as those allegations did not comply with the requirements of the Board's Rules Nos. 14 and 16. Those Rules state:

14. Any response filed with the Board must include the following details:

- (a) the full name, address, telephone number and facsimile number (if any) of the responding party, of a contact person for the responding party and of any other person who may be affected by the application;
- (b) a statement of agreement or disagreement with each fact or allegation in the application;
- (c) a statement of the responding party's position with respect to the orders or remedies requested by the other parties;
- (d) *where the responding party relies on a version of the facts different from the applicant's, a detailed statement of all material facts on which the responding party relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.*

[emphasis added]

16. Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly.

The Board's Rule No. 20 states as follows:

20. No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

12. The Board ruled (Board Member Rundle dissenting) as follows:

We have considered the parties' submissions. Whether or not the response in question is governed by Rule No. 14 or Rule No. 16, it is clear that a party is required to file "a detailed state-

ment of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly”.

Paragraph 6 of the response does not provide a detailed statement of material facts, including the circumstances, what happened, and when and where it happened. The paragraph provides the names of the people alleged to be subject to the threats, but does not indicate which of the two people is alleged to have made the threat to employees. If this were a complaint by a union alleging that foremen had threatened employees that if they signed cards they would lose their jobs, we would expect the union to advise the employer as to all of the material facts listed in Rule No. 12, for each and every person alleged to have been subject to the threat. The same standard should apply in this case. We do not believe that paragraph 6 provides the union with sufficient particulars to know the case it is required to meet.

There are no particulars pleaded with respect to the present witness, except for those which relate to a date after the certification application was submitted. The responding party will therefore not be permitted to call evidence from him which does not relate directly to the flyers. Yesterday, we exercised our discretion and permitted Mr. Vo to give testimony with respect to a conversation on March 8, because the question asked appeared to be related to the leaflets and counsel did not know what the witness would say. It did turn out that the evidence was unrelated. However, we will not permit the responding party to embark on a whole area of evidence with several more witnesses which has not been sufficiently pleaded. The allegations against the union are serious ones and they should have been provided with more detail prior to the commencement of this hearing.

We will also not allow evidence to be called with respect to the flyer being found in the lunchroom. The responding party has not pleaded that it was found anywhere but the parking lot. We also note that the responding party does appear to have had prior contact with this witness about these matters, as it did plead detailed allegations about him with respect to a period of time after the certification application.

13. Although the Board's new Rules of Procedure came into effect in January 1993, and this was one of the first rulings under them, the Board has had long-standing requirements with respect to particulars. (See *International Cooperage Company of Canada Limited*, [1963] OLRB Rep. Apr. 47; *Ellis Don*, [1970] OLRB Rep. Aug. 587; *The International Brotherhood of Painters and Allied Trades, Local 1891*, [1974] OLRB Rep. Apr. 244; *Racine, Robert and Gauthier Reg'd.*, [1978] OLRB Rep. June 559; *Guaranteed Insulation '77 Ltd.*, [1981] OLRB Rep. Oct. 1394; *International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233; *Township of Lake of Bays*, [1992] OLRB Rep. Aug. 970.) In these cases, the Board has noted that the purpose of the requirement for adequate particulars is of course to ensure that a party is well aware of the case that it has to meet. The company's paragraph 6 did not provide particulars as to the circumstances or when and where the alleged threats occurred. Furthermore, the paragraph does not indicate which union organizer threatened which employee, although that information presumably was available from the employees claiming to have been threatened.

14. For similar reasons, the Board also excluded evidence with respect to the flyers being found in a location other than that particularized in the pleadings, i.e., in the parking lot.

15. Furthermore, the Board did not adjourn to allow the company to provide particulars, as it was the majority's view that this was a matter in which, given the time-sensitive nature of labour relations issues as seen in the context of a certification application, delay should be minimized. The thrust of a number of the amendments of the *Labour Relations Act* and the Board's revised Rules is to expedite the proceedings before the Board, and reduce the delays which sometimes attended Board hearings. Delay in certification proceedings particularly should be minimized. The Board notes that in its correspondence in reply to the response dated March 30, the union put the company on notice that the response failed to provide sufficient particulars. The company had not provided further particulars as of the first day of hearing, April 5.

16. On the next hearing day, the company requested that the Board reconsider its ruling. Essentially, it repeated its arguments. The Board rejected the request for reconsideration as it did not raise a significant issue of Board policy nor did the company indicate that it intended to raise new argument or adduce new evidence with respect to the issue which would not have been available to it through the exercise of due diligence (see *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, and *Cambridge Reporter*, [1992] OLRB Rep. Oct. 1059, at para. 15).

* * *

17. After the Board's ruling with respect to the request for reconsideration, the hearing adjourned until April 25. In the meantime, on the parties' agreement, the Board provided a written notice in Punjabi and Vietnamese advising employees of their statutory rights. This notice was posted at the company's premises. Also during this hiatus, the Board received four pieces of correspondence from the company seeking to amend its response to include particularized allegations with respect to threats against employees which took place prior to March 9, 1993.

18. On April 25, 1993, the parties presented their arguments with respect to the company's request to amend its response. The company argued that it should be permitted to amend its response to include the new allegations because the circumstances had come to its attention subsequent to the filing of its response. The union strenuously objected to the Board permitting the company to amend its pleadings.

19. The Board has the discretion to allow a party to amend its pleadings. Nevertheless, in the normal course the Board is reluctant to permit a party to amend pleadings to include new facts because of its interest in ensuring that parties know the case they have to meet at the commencement of a hearing. However, the Board did ultimately permit the company to amend its pleadings in light of the very particular circumstances of this case.

20. All of the employees alleged to have been threatened spoke little English and were relatively recent immigrants to the country. The company advised the Board that witnesses would testify that they were too intimidated by the alleged threats of the union, coupled with their cultural and language barriers, to come forward sooner. Furthermore, they would testify that they had not understood the Board's "Notice to Employees of Application for Certification", commonly referred to as the "green sheet", which advises persons to file responses with the Board by the terminal date. The company also advised that some of the employees had come forward in response to the Board's notice posted in Vietnamese and Punjabi.

21. Out of concern that the Board be accessible to workers in the province, whatever their language and country of origin, we finally did permit the company to amend its pleadings. It was decided that the Board would hear the witnesses' evidence with respect to why they had not come forward with their allegations sooner together with their other testimony, as we were advised there would be significant overlap.

22. The Board was aware that permitting such extensive amendment to the response at that point in the proceeding would be prejudicial to the union. Under the circumstances however, the Board felt that the prejudice to the union was outweighed by the possibility that employees might have been deprived of their right to bring their concerns to the Board in a timely fashion by their language and cultural barriers. We ruled (Board Member McDonald dissenting) as follows:

We have considered the submissions of the parties. As we are all aware, the circumstances of this case are unique. In light of the submissions which we have heard today for the first time as to the responding party's ability to plead these facts in accordance with the time requirements of the Board's Rules, we are prepared to allow the response to be amended to include the allega-

tions found in the respondent's correspondence of April 13, 19, 21 and 23. We will not permit any further amendments. The posting has been up at the workplace for six days which is sufficient time for any employees to come forward. We will not change our ruling not to join the section 91 complaints with the certification application.

However, after hearing the evidence, the majority does not find that the company's witnesses were unaware of the significance of the green sheet or were not able to determine that significance if they were concerned. The Board also does not find that these witnesses were too intimidated to come forward with their allegations in a timely fashion.

23. The Board also made an interim ruling with respect to questions the company wished to ask in cross-examination. During the course of the company's evidence, one of its witnesses (Witness A) identified a union organizer (Witness B), who was alleged to have threatened him at the time he signed his membership card, by a particular name. Counsel for the company asked Witness B (who was waiting outside the hearing room) to come into the room, so that Witness A could physically identify him as the person alleged to have uttered the threat. The union agreed that the person in question (Witness B) was present at the time the alleged threat took place, and that he was the person who collected the union membership card from Witness A. However, when Witness B testified before the Board, he did so under a different name from the one used by Witness A. Counsel for the company cross-examined him about the fact that he was known by a different name. Counsel also put to him that he had worked for the company on a previous occasion under the name used by Witness A. Witness B denied he had worked for the company under a different name. Counsel for the union objected to this line of questioning. The Board permitted the questioning of Witness B on the grounds that the company should be permitted a wide range in cross-examination to test the credibility of the witness. At no time, however, was there any issue that Witness B was not, in fact, the person who Witness A alleged had uttered the threat. The *only* issue raised by the company's question was whether or not an employee or employees of the company might refer to Witness B by a different name, and whether he had worked for the company previously under a different name.

24. The union then called another witness (Witness C). The first questions put to Witness C in cross-examination by the company's counsel were whether he had known Witness B by another name, and whether Witness B had previously worked at the company under a different name. Counsel for the union objected to this line of questioning on the basis that it related to issues collateral to those before the Board. The union argued that the company was stuck with the answers given by Witness B on cross-examination and was not permitted to call evidence to contradict that testimony. The Board permitted the parties to defer argument on the matter until after the lunch break so that they would have an opportunity to review and present case law.

25. Counsel for the company argued that he should be permitted to put the questions to Witness C as they dealt with a substantive issue for the Board, specifically the identity of Witness B. As we have stated, the identity of Witness B, i.e., whether or not he was the person alleged to have made the threat, was not in issue. He had been personally identified by Witness A. The issue that had arisen as a result of the company's questions was whether or not Witness B was known by two different names at the company because he had worked there previously under a different name. Therefore, the only reason the questions were being put to Witness C was to impeach the credibility of Witness B. The majority, therefore, ruled the questions inadmissible.

26. The collateral fact rule has been articulated in Sopinka & Lederman, *The Law of Evidence in Canada*, as follows:

B. The Collateral Fact Rule

There is a general rule that answers given by a witness to questions put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. Without such a rule, there is the danger that litigation will otherwise be prolonged and become sidetracked and involved in numerous subsidiary issues. The rule does not permit the use of extrinsic evidence to contradict a witness who has made a statement in cross-examination which is relevant to the substantive issue; but, with respect to questions which are directed solely to impeaching a witness' credibility, the answers must, save for certain common law and statutory exceptions, be accepted as final. Difficulties have arisen, however, because of uncertainty as to whether a question merely goes to a collateral issue or whether it goes to a substantive one. Pollock C.B. attempted to articulate the distinction in *A.G. v. Hitchcock*, as follows:

... the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence - if it has such a connection with the issue, that you would be allowed to give it in evidence - then it is a matter on which you may contradict him.

...

The company would not have been permitted to prove in evidence that Witness B had worked previously under a different name, or even that he was known by two different names at the workplace, unless there was uncertainty as to whether or not he was the person that Witness A alleged had threatened him. There was no such uncertainty. The evidence would therefore not be admissible as it is collateral to the substantive issues before the Board.

27. The Board, although not bound by the common law rules of evidence, has acknowledged the applicability of the "collateral fact" rule in certain cases and allowed counsel to cross-examine a witness on matters that are not relevant to the issues before it, except to the extent that they relate to that witness's credibility. Under the collateral fact rule, however, the corollary for being permitted to cross-examine a witness on a collateral issue is that the party cross-examining cannot introduce evidence to contradict the witness's answer. The collateral fact rule does not apply only to limit evidence called in reply, but to any rebuttal evidence, including any evidence called through cross-examination from a subsequent witness. The purpose of the collateral fact rule is as applicable to cross-examining other witnesses as to calling reply evidence. To allow cross-examination of a subsequent witness on the collateral issue if it is not related to *that* witness's credibility, would open up a whole new area of inquiry which would require the original witness to call evidence to prove his version of the facts. This is the very situation that the collateral fact rule is designed to avoid. The need for such limitations is abundantly clear when one considers the present matter which required more than forty days of hearing. The rationale for this rule of evidence is outlined in *The Attorney General v. Hitchcock*, (1847) 1 Ex. 91, 154 E.R. 38 at 43.

But, with these exceptions, I am not aware that you can with propriety permit a witness to be examined first, and contradicted afterwards, on a point which is merely and purely collateral, as for instance as to his personal character, and as to his having committed any particular act. The inadmissibility of such a contradiction depends, indeed, upon another principle altogether. Perhaps it ought to be received, but for the inconvenience that would arise from the witness being called upon to answer to particular acts of his life, which he might have been able to explain, if he had had reasonable notice to do so, and to have shown that all the acts of his life had been perfectly correct and pure, although other witnesses were called to prove the contrary. The reason why a party is obliged to take the answer of a witness is, that if he were permitted to go into it, it is only justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross-examined as to their conduct, such a course would be productive of endless collateral issues. Suppose, for instance, witness A. is accused of having committed some offence; witness B. is called to prove it, when, on witness B.'s cross-examination, he is asked whether he has not made some statement, to prove which witness C. is called,

so that it would be necessary to try all those issues, before one step could be obtained towards the adjudication of the particular case before the Court. On the contrary, if the answer be taken as given, if the witness speaks falsely he may be indicted for perjury. That is the proper remedy....

The majority of the Board finds the concerns articulated in the above decision particularly pertinent in these circumstances, and we therefore did not permit the company to cross-examine Witness C or any of the union's subsequent witnesses with respect to whether or not Witness B was known by more than one name at the workplace, or whether he had worked there previously under a different name. This line of questioning was merely collateral and not helpful to the resolution of the substantive issues before the Board. In any event, a number of other witnesses testified with respect to the circumstances in which the threat against Witness A was alleged to have taken place, and we were therefore not required to rely solely on the evidence of Witness B.

28. The company immediately requested that we reconsider the above ruling. In the interests of expedition and finality, the situations in which the Board will reconsider its decisions have been limited to those in which evidence has come to the attention of a party which could not have come to its attention previously by the exercise of due diligence or those situations in which a significant issue of Board policy has been raised. The Board found that neither of those circumstances existed with respect to this evidentiary ruling, and the request for reconsideration was denied.

Decision

29. Although the Board was required to make a number of legal and procedural rulings as outlined above, fundamentally this matter rested upon the factual determination of the following disputed allegations.

30. The company alleged that flyers which stated: "No union = no jobs" were found on car windshields in its parking lot on the night shift of March 7. It suggested that employees may have signed cards out of fear that they would lose their jobs in the event that the union was not certified because they had seen those flyers. The union denied that there were flyers in the parking lot stating: "No union = no jobs" on the night of April 7. However, it claimed that there was a flyer which stated: "Union = no jobs" on that evening.

31. It was alleged in the amended response that nine employees had been threatened by in-house union organizers that if they did not sign a union card they would lose their jobs. There was one allegation that an employee had been threatened with physical harm if he did not sign a card. There was also an allegation that an employee had been intimidated in the month of April, as a result of his participation in the dispute before the Board. The union denied that any employee had been threatened by union organizers.

32. Mr. Ansah alleged in oral particulars that he had been forced to sign a union card by one of the in-house union organizers, Mr. Hittu Desai. Mr. Ansah alleged that Mr. Desai told him that he would lose his job if he did not sign a card. The union denied that Mr. Desai threatened Mr. Ansah and claimed that, in fact, Mr. Ansah had been an enthusiastic supporter of the union.

33. Sixteen people testified for the company. Mr. Ansah testified on his own behalf, but called no other witnesses. Eleven people testified on behalf of the union. The company called four witnesses to give reply evidence.

34. The Board's decision in this matter was determined by its findings with respect to the credibility of the various witnesses. The Board was repeatedly required to ask itself whether it

believed a company witness who claimed that he had been threatened, or a union witness who denied doing so.

35. English was the first language of only three of the witnesses who testified in this matter. The majority of the witnesses testified through interpreters. The receipt of evidence through interpreters presents a special challenge to the Board. The receipt of evidence through an interpreter often deprives the trier of fact of the ability to use nuance in its assessment of credibility. Furthermore, the Board can never be confident that the translation is completely accurate, particularly when it becomes apparent, as it did in this case, that some languages seem to lend themselves more to literal translation into English than others. The complexity of this situation was increased by the fact that many of the witnesses had immigrated to this country in the last few years. The Board must evaluate the presentation of evidence from such witnesses with sensitivity to the possible effects of cultural differences. Nevertheless, these are challenges that the Board must and does face on an almost daily basis. (See *CMP Group (1985) Ltd.*, [1993] OLRB Rep. Dec. 1247.) In this case, the Board has taken into account the difficulties of receiving evidence through an interpreter and has also considered the effect cultural differences may have on the presentation of evidence, particularly upon such factors as the demeanour of witnesses when giving their evidence. In these circumstances, the Board has placed greater but not exclusive emphasis on the other factors used to assess credibility, specifically the clarity and consistency of the evidence (taking into account any differences in answers which might be attributable to translation difficulties), the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers and what seems most probable in all the circumstances.

36. After applying these factors to the witnesses in this case, the Board found that almost every one of them had significant inconsistencies in their evidence and appeared to have been affected by self-interest. However, in the circumstances of this case, the Board sees no advantage to anyone or to any party in embarking on an extensive and painstaking comparison of the testimony of over thirty witnesses outlining why we prefer the evidence of one over another. These employees must continue to work together and we expect that this decision will be widely circulated and discussed. We have however carefully considered the evidence of each and every witness.

37. With respect to the allegations of threats by union organizers, the areas in which the union witnesses showed most inconsistency were those related to times and dates. Such inconsistencies may be attributable to the delay between the time that the union organizing drive was taking place and when they testified. The inconsistencies in the evidence of the company witnesses, on the other hand, were more difficult to explain. On balance, we preferred the evidence of the union witnesses to those of the company on the central issue which was before us, specifically whether or not the company witnesses had been subjected to threats by union organizers that they would be fired by the union if they did not sign cards. The company witnesses appeared to be most deeply affected by their own interest in shaping their answers and, for the most part, the union witnesses' version of events seemed more probable in the circumstances. The company, for example, called two witnesses who, according to the pleadings, alleged that they had signed cards at the same time and under the same threat by two union organizers. However, when the witnesses testified, they gave significantly different versions of events. One of the witnesses claimed for the first time that he had not even signed a card although a card had been submitted to the Board bearing his signature which matched that provided by the company. This was not an allegation that was in any way supported or substantiated by the other witness who was supposed to have been present at the time, nor by the union witnesses.

38. We also found that the company witnesses' explanations as to why they had not come forward with their allegations earlier did not make sense in the circumstances and were not other-

wise credible. The witnesses' delay in making their allegations until after these proceedings had begun and the Board had issued its initial ruling, contributed to the determination that they ought not to be believed where their evidence conflicted with that of the union witnesses on the issue of the alleged threats.

39. We also assessed the evidence of Mr. Samuel Ansah, according to the usual factors and the majority found that it lacked credibility. Mr. Ansah did testify in English. On April 6, 1993, Mr. Ansah was requested to verbally provide the particulars of his allegations so that the union would know the case it had to meet. He stated to the Board and the parties that he had been forced to sign a union card by Hittu Desai, who had said he would lose his job if he did not sign. He said he did not remember when this took place, but that it was on the "A" shift, and it was midnight in the compound department. He indicated that he signed the card when that conversation took place, and that no one else was present. The evidence that he gave under oath however, was significantly different. He testified that Mr. Desai had approached him and said that if he did not sign a card he would lose his job, but that three days later, a different union organizer brought the card to him and that he signed it. In light of these inconsistent accounts, the majority finds that it cannot accept his version of events.

40. The Board does, however, find that there were flyers in the parking lot sometime in the middle of the night on March 7-8 which said: "No union = no jobs". However, there was no evidence that the flyers were on the cars at the beginning of the shift or at the end of the shift. In fact, the evidence was to the contrary. As the flyers were only on the cars in the middle of the night, it is unlikely that more than a few people saw them. In any case, there was no evidence to tie the flyers to any union organizer. A union which is party to an application for certification cannot be held responsible for the actions of employees who are not union organizers (*Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331, at 1333; *Walbar of Canada Inc.*, [1982] OLRB Rep. Nov. 1734). Further, reading such a flyer is not likely to intimidate an employee into signing a card that he or she otherwise would not have signed. The existence of such flyers in a workplace is not sufficient to cause the Board to question the validity of the membership evidence filed by the union and to order a vote.

41. The union alleged that there was a flyer in the parking lot on March 7-8 but that it said "Union = no jobs". This flyer appears to be exactly the same handwritten flyer as that submitted in evidence by the company, except that the word "No" was removed. It is possible that someone found the flyer that night and photocopied it, with the word "No" removed as a countermeasure to the pro-union propaganda. However, it is not necessary for us to make a factual ruling with respect to the existence or origin of this second flyer, as the issue before this Board is whether or not the union organizers misconducted themselves so as to taint the membership evidence that was submitted.

42. During the cross-examination of one of the union organizers, the company alleged that he had been threatened by the union and had so advised management. The witness emphatically denied that he had been threatened by the union and claimed instead that he had been threatened by management. On the basis of the evidence presented, the majority does not find that a threat was made to the union organizer as claimed by the company.

43. Section 8 of the Act provides as follows:

8.- (1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and

- (b) the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.

(6) The Board may consider evidence of a matter described in paragraph 2 or 3 of subsection (4) but only for the purpose of deciding whether to make a direction under subsection (3) and only if the evidence is filed or presented on or before the certification application date and is in writing and signed by each employee concerned.

(7) Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;
- (b) requiring that evidence of a matter described in paragraph 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned be proven to be a voluntary expression of the wishes of the employee; or
- (c) considering, in relation to evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned, further evidence identifying or substantiating that evidence.

Thus, the Act provides that the Board may certify a union without holding a vote if it submits evidence that more than fifty-five per cent of a bargaining unit are members of the trade union or have applied to become members of the trade union. However, the Board retains a discretion to order a vote even when the union represents more than fifty-five per cent of the employees. Nevertheless, it has not done so unless improper actions on the part of the union cast sufficient doubt

upon the reliability of the membership evidence to persuade the Board that a representation vote is warranted to determine the true wishes of the employees. The Board does not embark on a general inquiry as to the circumstances in which membership evidence was collected in the normal course, nor does it do so everytime a responding party or employees allege that threats of intimidation and coercion have occurred. In such circumstances, the Board follows its usual process of comparing the employee signatures on the membership evidence submitted by the union with those provided by the company. Independent inquiries are made into any signatures that appear questionable. (See *Billow's Raceway Auto Parts Inc.*, [1993] OLRB Rep. May 397.) The Board will also hold a hearing into the specific allegations of misconduct. If the misconduct is not substantiated by evidence presented at the hearing, the Board accepts the membership evidence presented by the union.

44. The Board has outlined the scheme for certification in situations where the union submits evidence that it represents more than fifty-five per cent of the employees in previous cases. For example, in *Shaw Industries Ltd.*, [1993] OLRB Rep. Aug. 798, the Board stated as follows:

23. Although section 8(3) of the *Labour Relations Act* confers on the Board a discretion to order a representation vote even where the applicant union has demonstrated membership of more than fifty-five per cent, the Act contemplates automatic certification to a union that has demonstrated this level of support except in exceptional circumstances.

24. Generally, once satisfied that the applicant has more than fifty-five per cent support, the Board will not exercise its discretion to order a vote unless there are compelling reasons to do so and on the basis of cogent evidence. (See *Walbar of Canada Inc.*, [1982] OLRB Rep. Nov. 1734; *Gruyich Services Inc.*, [1986] OLRB Rep. Aug. 1092; *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138; *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, and *Shrader Canada Limited*, [1993] OLRB Rep. Mar. 246.) The Board has found in a number of cases that its discretion under section 8(3) should be exercised in a way that recognizes that the statutory scheme is based primarily on documentary evidence of membership. In *P. J. Wallbank Manufacturing Co. Limited*, [1988] OLRB Rep. Mar. 319, at 321, the Board stated:

"In this jurisdiction representation votes remain a residual mechanism resorted to only when the union is unable to establish a "clear majority" (i.e. more than fifty-five per cent), there is some reason to doubt the reliability of the membership evidence as an indicator of employee wishes, or there is some policy reason or special circumstance warranting the additional evidence of a representation vote. The Statute is quite clear that where the union has established the requisite "clear majority", votes are to be the exception, not the rule".

25. In *Gruyich Services Inc.*, *supra*, at 1095, the Board had this to say:

"The scheme of the *Labour Relations Act* makes the documentary evidence filed by a trade union in support of an application for certification the primary basis upon which the wishes of the affected employees are gauged. The Board does not solicit *viva voce* opinions regarding the virtue, or lack of virtue, in union representation. Representation votes are a residual mechanism for use in circumstances where the trade union either cannot demonstrate clear majority support (i.e. more than 55%) or where the circumstances and the particular application call for one".

26. Thus, rather than ensuring majority employee support in every case by requiring a representation vote, the legislation in Ontario (and most jurisdictions in Canada) ensures that there is majority support for the union by certifying without a vote in cases where the union has support of more than fifty-five per cent of the members. Once an applicant union has demonstrated more than fifty-five per cent support in the form of membership documentation, it is only in exceptional circumstances that the Board will exercise its discretion to order a representation vote. This practice generates certainty for all parties involved and ensures that the certification process is as expeditious as possible. At the same time, the integrity of the certification process

is protected by allowing the Board some discretion to order a representation vote only in cases where warranted.

27. Requiring compelling reasons before ordering a representation vote is justified by the fact that the Legislature has set the threshold for automatic certification at more than a simple majority. In *Unlimited Textures Company Limited*, *supra*, at 142, the Board said:

“The Legislature’s choice of membership evidence as the primary basis for the certification decision recognizes the obvious correlation between a desire for trade union representation and the act of joining a trade union. Any uncertainty inherent in equating the two is balanced by striking a confidence level of fifty-five per cent ...”.

28. Over time, the Board has developed a non-exhaustive list of what may be “compelling reasons” to order a vote in circumstances where the union has otherwise filed evidence of sufficient membership support. A vote may be required where one of the following intervening factors arises and calls the evidence into question: build-up or build-down of the bargaining unit (*Cobi Foods Inc.*, [1987] OLRB Rep. June 815; *Simpsons Limited*, [1985] OLRB Rep. May 731); stale membership evidence (*Primo Importing & Distributing Co. Ltd.*, [1981] OLRB Rep. July 953); unreliable membership evidence (*Gruyich Services*, *supra*); intimidation or coercion (*PRC Chemical Corp. of Canada*, [1980] OLRB Rep. Dec. 1805; *St. Michael Shops of Canada Ltd.*, [1979] OLRB Rep. Apr. 346); misrepresentation or fraud (*Carleton University*, [1975] OLRB Rep. Apr. 308; *General Motors of Canada Ltd.*, [1980] OLRB Rep. Oct. 1437).

45. In a situation such as this, where the union submits evidence of support of more than fifty-five per cent of the employees in the bargaining unit, the Board will not exercise its discretion to order a vote unless that evidence is tainted, usually by misconduct on the part of the union. The scheme of the Act does not contemplate the Board falling back on the vote mechanism because it is faced with contradictory evidence which make it difficult to make factual determinations. It is the Board’s responsibility to make factual determinations when faced with allegations of improper conduct in an organizing drive. Unless the Board makes such a finding, the union is entitled to rely on the membership evidence it has submitted. In these circumstances the majority finds that, on the balance of probabilities, the alleged threats were not made to the company’s witnesses or to Mr. Ansah. The Board is confident that the signed cards presented in the union’s application represent the true wishes of the employees who signed them at the time that they were submitted. It is noted that the only allegation that a card was not signed by the person whose name was on it was raised for the first time in the middle of one witness’s testimony. As explained above, the Board finds it must discount that testimony.

46. For the above reasons, the Board certified the union in its decision of June 6, 1994.

* * *

47. On June 16, 1994, the Board received a request for reconsideration of its June 6 decision from the company. The company was objecting to the fact that a bottom-line decision was issued, as well as to the content of that decision.

48. It is common practice for the Board to issue bottom-line decisions in circumstances where it is of the view that the expeditiousness of such a course is warranted. In these circumstances, a bottom-line decision was warranted because more than a year had passed since the application had been filed, and it was important for the parties to commence their new relationship with its attendant rights and obligations as soon as possible. Furthermore, at the time the bottom-line decision was issued, the Vice-Chair was still on maternity leave and it was therefore unclear when a decision with full reasons would be issued. It is also noted that the Board issued a bottom-line decision in a separate dispute that arose between these parties while the certification matter was being litigated without any objection on the part of either party. Furthermore, at the conclusion of

the argument in this matter, the Board indicated that it would attempt to issue a bottom-line decision and no objection was made at that time. In its decision, the Board advised that it would be issuing fuller reasons in due course, which it is now doing.

49. In the request for reconsideration, the company also referred to a “petition” submitted to the Board subsequent to its decision. The Board did receive a number of hand-written documents purporting to be signed by employees of the company objecting to its decision. These documents appear to be an attempt by unknown persons to lobby the Ontario Labour Relations Board after it has rendered a decision, and are therefore not evidence that may be considered. The majority denies the company’s request for reconsideration.

50. The company also submitted a request that the Board’s decision be stayed on an interim basis. It claimed that it should not be required to commence collective agreement negotiations with the union until it had received the Board’s reasons. In a decision dated June 30, 1994, a different panel of the Board denied the request for a stay.

51. This was a lengthy and complicated hearing, involving many witnesses who were subject to extensive cross-examination. The Board was required to make numerous rulings throughout the proceedings, many of which resulted in reconsideration requests from the company. The Board carefully considered the evidence of all of the witnesses and the submissions and arguments, both written and oral, of the parties. The majority has determined that the intimidation and coercion alleged by the responding party and the intervenor was not supported by the evidence they presented and that the existence of the flyers did not affect the reliability of the membership evidence. The Board therefore issued a decision certifying the union on June 6, 1994.

DECISION OF BOARD MEMBER J. A. RUNDLE; August 26, 1994

1. In writing my dissent I have followed the format of the majority decision therefore I will address the preliminary rulings first followed by my comments on the merits.

Preliminary Rulings

2. The Board made two preliminary rulings which in my view raise issues of natural justice. The majority of the Board, in a ruling made April 6, 1993, would not permit the Responding party to present evidence directly related to the material facts in dispute in the proceedings. Specifically the Board would not permit the Responding party to call a number of employees to testify as to the threats they were subjected to during the organizing drive, or where an employee may have seen the flyer (“No Union - No Jobs”) if not seen in the parking lot. The majority of the Board made this ruling based on an alleged lack of particulars in the response filed by Royalguard. The response did provide the names of the employees who were threatened, the name(s) of the union organizers who carried out the threats (Tai Hynh or Hitendre Desai) the timing of the threats (during the organizing drive), and the nature of the threats (if they did not sign cards in favour of the union they would lose their jobs).

3. In my view Royalguard’s response was sufficiently particularized to allow in the evidence of the flyers appearing in the lunchroom. The Board has developed principles and standards regarding the sufficiency of particulars. *Guaranteed Insulation*, [1981] OLRB Rep. Oct. 1394 provides a basic overview of these principles, and a review of the purpose of particulars. The Board noted that sufficient particulars were required for the following reasons; to avoid prejudice, delay, or embarrassment to the opposing party; or to enable parties to know in advance what case they have to meet; to reduce surprise; to enable parties to prepare for cross-examination, and to determine what parties to call in rebuttal.

4. There are several grounds on which to argue that the particulars in the response were indeed sufficient to allow the responding party to call evidence about the flyer. Firstly in *Racine, Robert and Gauthier Reg'd.*, [1978] OLRB Rep. June 559, the Board stated that its rules prohibited admission of evidence that was unsupported by sufficient particulars. However, the Board also stated that the rules were not rigid, nor were they “an inflexible rule of law” (p. 566). I would find that in this instant case as the Board’s rules do not flow from the Statute, the exclusion by the majority of the flyer evidence was a rigid, inflexible application of the Board’s rules. The Board has never had a policy of hiding behind the rules in this fashion, in doing so now the Board does itself a disservice.

5. Secondly the Board has commented on what constitutes sufficient particulars in several cases. In *International Association of Bridge, Structural and Ornamental Iron Workers*, [1982] OLRB Rep. Feb. 233 the Board found that its rules require only a concise statement of the material facts upon which the party intends to rely. Similarly in *Racine*, the Board found that as in *General Freezer* (65 CLLC ¶16,019) it was appropriate to consider whether particulars “substantially identify and describe the offences alleged” in gauging their sufficiency. Royalguard’s response did refer to the flyer being found at the workplace on March 7, 1993. This reference focused on the flyers being found in the parking lot, and also referred to employees taking the flyers from the parking lot into the workplace. With respect, the reference to the workplace was in my view sufficient pleading to allow the responding party to call evidence relating to the cafeteria as the pleading need only be concise and it substantially identified the issue being alleged. In *Ellis Don Limited*, [1970] OLRB Rep. Aug. 587 the Board stated that pleadings must:

... sufficiently describe the actions or omissions complained of so that the responding party may direct his attention to such matters in order to properly prepare his case.

Royalguard’s response did refer to flyers being found at the workplace on March 7, 1993. The response mentions the parking lot, and that employees carried the flyers from the parking lot into the workplace. With respect, these pleadings are sufficient to direct the union’s attention to the issue of flyers appearing at various locations within the workplace, even including the lunchroom.

6. The Board has further stated that it will hear evidence that was not sufficiently particularized if this does not prejudice other parties, *Speedex Co.*, [1981] OLRB Rep. Dec. 1829. Even if Royalguard’s pleadings were not sufficiently particularized, what was the prejudice to the other parties particularly as the response did provide notice that the issue of the flyers would be raised, and given that only two witnesses were being called regarding the flyers in the lunchroom. There was no prejudice to the other parties given the early stage of the proceedings (this hearing took over 40 days in total to complete).

7. The Board could have, as was done in *Luciano D’Allesandro*, [1984] OLRB Rep. June 805, decided to hear the contested evidence but grant an adjournment to the other parties so they could prepare a response. The Board allowed this, even though there had already been lengthy proceedings, unlike the Royalguard case where this issue was raised in the very early stages of the proceedings.

8. The Board has granted adjournments to allow parties to amend their insufficient particulars. In *Ontario Hydro*, [1992] OLRB Rep. Jan. 47, the Board granted an adjournment and stated the criteria it would consider in such cases, including; the stage of the proceedings; the prejudice to another party; whether the amendment could be dealt with in a separate proceeding; reasons for failure to plead initially; and the extent that amendments would raise new issues and particulars. With respect, Royalguard more than satisfied these criteria and should have in the alternative been granted an adjournment to amend its pleadings.

9. In summary the evidence regarding the flyer in the lunchroom should have been allowed for the following reasons; the Board's evidence rules are not inflexible; and that the particulars were sufficient as they are only required to be concise, to substantially describe facts and to direct a parties attention to an issue. The evidence should be heard even if the particulars were insufficient as there would be no prejudice to the union. Or, the evidence could have been heard under one of the following conditions; that the union be allowed to argue after the evidence was heard that the particulars were insufficient; that the union be granted an adjournment to prepare its response; or that Royalguard be granted an adjournment to amend it's pleadings. To not allow in this evidence in my view constitutes a denial of natural justice.

10. The second preliminary issue is the majority ruling of July 12, 1993 in respect of alleged collateral matters being put to the Applicant's witness Tai Hunyh. Mr. Hunyh was asked whether one of the applicant's organizers named Pandher was also known by some employees in the plant as Dhaliwal. Previously one of Royalguard's witnesses, Kuljeet Benipal, identified Pandher as being Dhaliwal. This identification was not objected to by the union. It was only when it became apparent the impact this evidence would have on Mr. Pandher's credibility that the Applicant raised it's objection. The majority of the Board applied the collateral fact rule of evidence in ruling that the respondent was not permitted to ask any of the Applicant's witnesses if they knew an employee by the name of Dhaliwal or similar name. With respect, I think the majority made an error in law by finding that this was a collateral fact, that the question of names was not at issue, and was irrelevant to the charges of intimidation. The Board therefore found that this evidence was inadmissible under the collateral fact rule. This evidence in my view was admissible for two reasons; the Board is not bound by common law evidence rules and the question of the names was not collateral but was substantive as it related to Mr. Pandher's credibility as an organizer and a witness.

11. The Board is not bound by the common law rules of evidence. Section 105(2)(C) of the *Ontario Labour Relations Act* allows the Board to admit evidence that may be inadmissible in court. This authority was organized by the court in *S. McCord and Co. Ltd. and OLRB et al* (1956) 4 OLR (2) 455. As well the Board has found in the past that it was not bound by other common law evidence, such as the rules prohibiting opinion evidence in *Dufferin Construction Company*, [1991] OLRB Rep. Oct. 1493, so long as the evidence was relevant and had probative value or cogency in law. While the Board may have applied the common law evidence rules in some cases or recognized them in others, it does not appear to be bound by them. The Board was not compelled to apply the collateral fact rule in this case, and was therefore not compelled to refuse to admit this evidence under it.

12. In my view the collateral fact rule was improperly applied. It is my position that the question of Mr. Pandher's two names is not collateral but, with respect, substantive. The credibility of organizers is always a substantive issue in a certification application. The majority agrees at paragraph 9 by stating:

"In a certification application, the Board's focus is on the *reliability of the membership evidence submitted by the union and upon which it is relying*".

(emphasis added)

The Board has recognized that certifications require membership evidence in the form of cards. As this evidence is confidential and is not usually subjected to cross-examination, the Board requires unions "to be scrupulous in the manner in which they conduct their organizing campaigns and obtain membership evidence". *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444 at 447; *T and F Construction Equipment Rental Limited*, [1983] OLRB Rep. Dec. 2116 and *Alex Henry*

and Son Ltd., [1977] OLRB Rep. May 288. The credibility of the organizers who gather the membership evidence is a central substantive issue in any certification application. The “credibility” of the membership evidence is only as good as the credibility of the people who gather it. Therefore as the question of the two names relate to Mr. Pandher’s credibility, it is not a collateral issue but actually central to the application. The majority decision of the Board in the present case clearly states there are significant inconsistencies with the credibility of almost every one of the witnesses evidence, and at paragraph 34 the majority acknowledges that its decision was determined:

... by its findings with respect to the credibility of the various witnesses.

As the majority itself clearly stated that witness credibility was a central issue, one must therefore conclude that this evidence as it related to Mr. Pandher’s credibility as a witness is a substantive not a collateral issue and should have been heard.

13. Therefore the evidence of Mr. Pandher’s being known by two names should have been admitted on two grounds. Firstly, the Board is not bound by the common law evidence rules, and did not have to concern itself with the collateral fact rule. But more importantly, this issue is substantive and not collateral; the credibility of union organizers is always a substantive issue in certification applications; and the majority itself identified credibility as a central issue in this case.

The Merits

14. A finding by the majority that the Responding party’s allegations have not been substantiated is in my view not dispositive of the matter before us. As the majority states at paragraph 9:

“In a certification application, the Board’s focus is on the *reliability of the membership evidence submitted* by the union and upon which it is relying.

(emphasis added)

After considering all of the evidence in this case it is my view that the Board cannot rely on the membership evidence submitted by the Applicant due to the lack of credibility on the part of the Applicant’s witnesses. The credibility of those witnesses is crucial as it relates to the membership evidence. As I stated in my June 6, 1994 dissent:

“Under the current Ontario law, employees have no right to a secret ballot vote to select or reject a trade union. A trade union can be certified solely on the basis of cards, which purport to show the employees’ wishes, and ordinarily the Board has no information about the manner in which those cards were obtained. We do not know what was said or done to persuade the employee to sign a card, but once the card is signed there is little practical opportunity for an employee to change his or her mind or to bring irregularities to the Board’s attention. This documentary hearsay is kept secret, and is not subject to scrutiny by the employer or anyone else. Yet it can lead to certification, which fundamentally affects the rights of the employees and the employer.

In a system such as this, *the Board must have complete confidence in the integrity of the persons who collected those cards* because they are the only link to the employees, and the only real guarantee that the card was obtained in a proper manner. However in this case, those collectors lied under oath again and again”.

(emphasis added)

15. The majority in paragraph 34 acknowledges that:

“the Board’s decision in this matter was determined by its findings with respect to the credibility of the various witnesses”.

Therefore the credibility of the Applicant’s witnesses goes to the very focus of the certification application - “the reliability of the membership evidence submitted by the union”. In assessing the witnesses credibility the majority refers in paragraph 35 to the factors they considered. The assessing of evidence poses many challenges even if the witness is speaking English. I am however unclear as to what relevance the fact that:

... many of the witnesses had immigrated to this country in the last few years... .

has in assessing the credibility of a witness. Furthermore I am unclear as to what “cultural differences” the majority is referring to, and again what relevance this has in assessing a witnesses’ credibility. I do not propose to delve further into these specific factors as they did not form part of the evidence or argument before us and accordingly are irrelevant and should not be a consideration in resolving the issues before the Board.

16. The majority after applying the factors outlined in paragraph 35 equally to all witnesses makes the following finding at paragraph 36:

“After applying these factors to the witnesses in this case, the Board found that almost everyone of them had *significant inconsistencies* in their evidence and appeared to have been affected by self-interest”.

(emphasis added)

The Board having found *significant inconsistencies* in the credibility of the Applicant’s witnesses must with respect recognize the impact those inconsistencies have on the reliability of the membership evidence. However, the majority goes on in paragraph 37 to find that:

... the areas in which the union witnesses show the most inconsistency were those related to times and dates.

The majority then goes on to justify these inconsistencies by finding:

“Such inconsistencies may be attributable to the delay between the time that the union organizing drive was taking place and when they testified”.

17. Attributing the Applicants witnesses inconsistencies to delay between the time of the occurrence of the organizing drive and the time they testified is a factor that must also be considered in weighing the evidence of the Respondent’s witnesses and the evidence of Mr. Ansah. Further there were, to use the majorities finding “significant inconsistencies” in the applicant’s witnesses that go well beyond inconsistencies over dates and times. The majority also in paragraph 39 finds that because Mr. Ansah’s testimony differed from his initial allegations then:

... in light of these inconsistent accounts the majority finds it cannot accept his version of events.

Again if this is another standard the Board is applying in assessing the credibility of the witness, this standard must then be applied equally to all of the witnesses. With respect, by applying this standard *none* of the applicant’s witnesses version of events can be accepted.

18. The hearing in this matter took place over a period of forty days and involved hearing the evidence of some thirty-two witnesses. The only way we can obtain a sense of the dynamics of this case is through the evidence and with respect, a *thorough* review of all the evidence discloses that the inconsistencies of the applicant’s witnesses went well beyond those related to dates and

times. The evidence of the union on all central issues is lacking in credibility and corroboration. It was almost as if each of the union's witnesses was doing his best to discredit the previous union witness or witnesses. What we have in the applicant's witnesses is not a mere collation of inconsistencies, rather we have entirely different stories from each of the witnesses. Those who were supposed to be together at the same time are not. Those who were supposed to have travelled together do not. People who have known each other for lengthy periods of time cannot remember being in the same car together for up to thirteen (13) hours in one day. Documents which allegedly were seen by various union witnesses are never shown to one another. The document known as Exhibit #13 ("Union = No Jobs") in fact, is never referred to for some three weeks after it allegedly appears, and then no original is produced even though this document according to Hitendre Desai was produced by management to "scare" the employees. George Adomah and Nana Frempah who allegedly saw Exhibit #13 at the same time contradict one another as to where it was found, who found it, what was done with it and what was said about it and to whom. A review of the evidence of Rashpal Narewal differs in every issue from the other witnesses who were allegedly together on that day. The evidence of Hitendre Desai in relation to the critical issue of the sign, Sam Ansah's involvement in the organizing campaign, Tai's involvement as an organizer, the alleged conversation with John Haddon and Stephen Cork are clearly not believable. The evidence on the same events given by Kuldeep Pannu and Pandher Mukhand differ from each other. The evidence of Cheema Vanderjit on any issue is unbelievable. The evidence of Tai Hynh on all of the critical issues contradicts the evidence of Hitendre Desai.

19. The following examples from the Applicant's witnesses disclose significant inconsistencies that go well beyond those related to dates and times and disclose inconsistent accounts of the evidence between witnesses who were presumably giving evidence about the same event.

a) In reviewing the evidence of Nana Frempah and George Adomah with respect to Exhibit #13, we note the following inconsistencies. Mr. Adomah says he found the sign on the floor in front of the company and waited for Mr. Frempah who was parking the car, to show it to him. Mr. Frempah says as they were parking the car, Mr. Adomah grabbed the paper off a car next to Mr. Frempah. Mr. Frempah says that he threw Exhibit #13 into the garbage. However in direct examination, George Adomah says he folded it, went into the plant and put it into the garbage chute. Mr. Adomah in cross-examination contrary to Mr. Frempah's testimony says that when he found Exhibit #13 on the ground, Mr. Frempah was not there. Mr. Frempah was the only witness who testified the sign was found in the back of a car - all the others said it was found on the windshield. Mr. Frempah said the sign was not wet, yet Mr. Adomah in cross-examination said it was a little wet as there had been showers.

b) The evidence of Mukhand Pandher who was by his own account one of the chief organizers and collectors, as well as Mr. Pannu and Mr. Sirai also organizers and collectors, is full of inconsistencies. On February 27 when Kingsley was selected as an organizer, Mr. Pandher said that Mr. Paris was not at the meeting. Hitendre Desai said Mr. Paris was. While this may not be critical in terms of that meeting it is critical in terms of what the evidence given by Mr. Mukhand purports to substantiate. Mr. Mukhand while recalling, he claims, the details surrounding the visit to the Chhina's cannot recall who was with him in the car that night. Mr. Mukhand's evidence is that he saw the cards that Mr. Sirai and Mr. Pannu are alleged to have had before they went up to the Chhina brother's apartment. The evidence of Kuldeep

Pannu and Satnam Singh Sirai is that Mr. Pandher couldn't have seen the cards because they were in their pockets. Mr. Pandher says that he was together with the same five people most of the day, save for Mr. Sirai who left to go on personal business. Mr. Sirai could not have been with them during the day as he was at work - this is established through the time cards and the evidence of Mr. Sirai himself. Mr. Pandher says Cheema Varinderjit was not with them that day yet Mr. Sirai says Mr. Varinderjit was with them. Mr. Pandher was asked in cross-examination if he recalls the Chhina's cards being different when they were returned. He responded that he couldn't remember and that others checked the cards then gave them to him. The other witnesses however said there was a conversation in the car about the addresses. One witness said Mr. Pandher instigated the conversation and another witness said Mr. Pannu instigated the conversation. In fact Mr. Pannu said that Mr. Pandher told him whose address was on the card.

c) Next we have the evidence of another chief organizer and collector Hiten-dre Desai. The Board at the commencement of the hearing made an order excluding witnesses. The Applicant chose Hitendre Desai as its advisor. The rules of evidence strongly suggest that where there has been an exclusion of witnesses and the advisor is to be a witness, he should be called to give evidence first. Mr. Desai was called by the applicant as its second to last witness. Mr. Desai was present during the full proceeding through examination and cross-examination of each and every witness, heard and viewed each witness and had every opportunity to tailor his testimony to the needs of the applicant's case at the time he gave evidence. In *Black v Besse*, [1886] 12 O.R. 522 (H.C.) pg. 309 the courts cautioned "the evidence of such a witness should be received, but with great care". And why is this? In the Law of Evidence in Canada, Sopinka states at page 826:

"The purpose of excluding witnesses is to preserve a witness' testimony, in its original state. A witness listening to the evidence given by another may be influenced by the latter's testimony and accordingly change his evidence to conform with it. Also, by being present in the court room and listening to testimony prior to giving his evidence, he or she may be able to anticipate and thereby reduce the effectiveness of, the cross-examination that will ultimately be faced. It may also facilitate collusion by allowing a witness to tailor the evidence to fit that of another".

The applicant could have called Mr. Desai as its first witness, it chose not to, therefore the Board can do no less than draw every adverse inference. Where Mr. Desai's evidence recalling he is a collector and organizer conflicts with another, Mr. Desai's evidence cannot be believed. Mr. Desai by his own evidence was not present in the computer room when Mr. Ansah and Mr. Pokhan signed their membership cards. He has no knowledge of what information was conveyed to either party at the time of signing. Mr. Desai returned to sign his name as collector and date the card. Mr. Pokhan and Mr. Desai's recollections of the signing of John Ramsunahi differ. Mr. Shaf-fee's evidence was that again Mr. Desai as the collector was not present in the computer room when Mr. Ramsunahi signed his membership card, while Mr. Desai's evidence is he was in the computer room when Mr. Ramsunahi signed his card. Mr. Desai further states that Mr. Samuel Ansah was his "left and right hand" when it came to the organizing campaign. He spoke to Sam "everyday" about the organizing campaign, yet when it came time to choose

organizers Mr. Desai did not select his close friend Sam Ansah. He chose instead Tai Hynh, someone he barely knew and Satnam Singh Sirai, someone with whom he had never discussed the organizing campaign. Why didn't he chose Mr. Ansah - Mr. Ansah lived with Charles a foreman at the plant and Mr. Desai was afraid that Sam would discuss the organizing campaign with him. This was the rationale behind not making Sam Ansah an organizer. Mr. Desai apparently felt no fear of discovery in discussing the organizing campaign daily with his "right and left hand" Mr. Ansah, yet when it came to choosing organizers, Mr. Ansah could not be one because of his relationship with Charles.

A review of Mr. Desai's evidence with regard to John Hadden is equally revealing. Mr. Desai speaks with conviction of what he understood Mr. Hadden's position to be vis a vis the union, yet Mr. Desai never spoke directly to Mr. Hadden. His information comes from a third person who was never called as a witness. Further the majority in paragraph 41 dismisses the evidence about Exhibit #13 (Union = No Jobs) as it is of little assistance in their determination. With respect this evidence goes directly to the credibility of Mr. Desai and Mr. Hunyh. The union first alleged that Exhibit #13 was seen by employees on march 30, 1993 at approximately 10:30 pm. The subsequent section 91 complaint alleges that Exhibit #13 was seen in the parking lot between 9:00 and 10:00 on April 1, 1993. If these allegations are true then Tai Hunyh, a union organizer who punched in that evening at 10:48 pm. would have seen it. In Mr. Hunyh's testimony he confirms that he arrived at 10:48 pm. and further confirms that he did not see any paper, in fact nothing. Mr. Desai was at work the night Exhibit #13 was seen. His evidence is he never saw Rob Pham with Exhibit #13 as Tai Hunyh alleges. He does however say that Tai told him of the incident with Rob Pham a few days later, yet it was Tai Hunyh's evidence that he never told anyone about this incident prior to coming to the hearing. Mr. Desai alleges he took Exhibit #13 off of his car, read it, folded it and put it in his pocket and does not look at it for the rest of the evening even though he felt that it was put there by management to scare employees. Mr. Desai then confirms that he told Brando Paris, a union official about Exhibit #13 prior to Mr. Paris sending the company a letter dated March 9. This sign however is not mentioned by the union until March 30 and even then the allegations are inconsistent with the evidence. Mr. Hunyh threw his copy of Exhibit #13 out - therefore the only copy would have to come from Mr. Desai to Mr. Brando. To date the Board has not seen the original of Exhibit #13.

d) Kuldeep Pannu's (another collector) evidence regarding the signing of Kuljeet Benipal again discloses significant inconsistencies. Mr. Pannu says that he and Mr. Sirai went into the Eurocollections factory and met an employee who paged Kuljeet Benipal and then went inside and called him. Mr. Sirai however who was present at the time recalled that the employee did not call Kuljeet and he was sure of this. Mr. Pannu in his evidence however has specific recall of the conversation including who made what statements. Yet he is seemingly unable to remember who was with him in the car that night, whether they went to see other employees, when they went to see other employees and how many cards he might have signed that day. With respect, all Mr. Pannu is doing is parroting what their witnesses have said

previously and will say after him in relation to union benefits, signatures on cards and the fact that the employee was happy. Mr. Pannu cannot recall whether he had a blank union card when he went in to obtain Kuljeet's signature. Nor did he recall whether Mr. Sirai had a union card. Why then were they going to obtain Mr. Benipal's signature if they did not between them, both being union organizers, have a membership card with them particularly as it was the evidence of Mr. Pandher and Mr. Desai that they were in a hurry to get membership applications. One can only conclude it was the intention of these collectors to place Mr. Benipal in the intimidating position of having to sign his card in front of four or five other employees.

20. In response to the finding in paragraph, the Board at the request of *all the parties* posted notices in the workplace in the languages requested by the parties. The Board notices outlined for the employees the rights which are protected by law in Ontario; specifically the right to join or not to join a trade union and the right to do so in an environment free of threats, intimidation and coercion. The request for the posting was made subsequent to the commencement of the hearing and in response to concerns expressed in the workplace. The subject matter of the notices addressed those concerns obviously to the satisfaction of the parties. Therefore it is clearly plausible and believable that employees who have been advised in writing by the Board of their rights under the law would then come forward to speak of their concerns.

21. As stated in my June 6, 1994 dissent I would have found this an appropriate case in which to order a secret ballot vote in order to determine the true wishes of the employees. The Board has stated that it can consider a broad range of circumstances when considering whether to order a vote under section 8(3). In *Gruyich Services Inc.*, [1986] OLRB Rep. Aug. 1092, the Board did not know whether the employees had received all of the Board's notices. Subsequently, the Board ordered a vote despite the union's sufficient membership evidence. In *Gruyich*, the Board stated that:

The legislation accommodates the possibility that circumstances other than the membership "count" may, in a particular case, make trade membership evidence less reliable as a measure of the employees' desire to be represented by a trade union.

The Board went on to say that it:

... must take into account, not only the membership evidence filed, but all of the *relevant circumstances* in determining whether or not to exercise its discretion to order a representation vote.

(emphasis added)

22. In my view the credibility of the Applicants employee organizers constitutes a relevant circumstance the Board must take into account to order a vote.

23. Firstly, the credibility of the union's employee organizers constitutes a relevant circumstance. This argument is reinforced by the extent that the Board must rely on the credibility of membership evidence. The Board has stated on numerous occasions that, because of the confidential nature of membership evidence, and because it is not usually subject to cross-examination, the credibility of membership evidence is crucial. The Board has said that unions must be "scrupulous in the manner in which they conduct their organizing campaigns and obtain membership evidence". (*Can-Eng Metal Treating Lt.*, *supra*, see also *T & F Construction Equipment Rental Limited*, *supra*, and *Alex Henry and Son Ltd.*, *supra*)

24. Because of the extent that the Board relies on the credibility of the membership evidence, the Board must also rely on the credibility of the people who collect it. If the credibility of the employee organizers who gathered the membership is at all questionable, then a representation vote should be ordered. Such is the case in *Royalguard* where the evidence clearly discloses the lack of credibility of those responsible for the collection of the membership evidence.

25. The Board has stated that any attempt to mislead the Board regarding membership evidence will weigh against an Applicant in a certification application. In *Webster Air Equipment Company Ltd.*, (1958) 58 CLLC 18,110) the Board was concerned that the Applicant union had failed to disclose that a union official had loaned an employee the one dollar membership fee. The Board stated that "any attempt to mislead the Board or any failure to make full disclosure of all material facts must weigh heavily against an applicant". In that case because a union official was involved, the Board dismissed the application. The credibility problems of the Applicants employee organizers in the present case are serious enough to constitute an attempt to mislead the Board.

26. The applicants witnesses through their evidence attempted to have us believe Mr. Ansah was an integral part and supporter of the union and its organizing campaign - indeed a tremendous supporter. A review of the evidence does not support this theory. Nana Frempah said that he found out about the union organizing drive from Mr. Ansah. Mr. Ansah it is alleged, tells Mr. Frempah about the benefits of the union but then tells him to see a co-worker, Kingsley, who is later revealed in evidence as being an organizer. With all due respect to Mr. Ansah and with no slight intended, it is hard to believe that Mr. Ansah would or could solicit support for the union or explain union benefits to other employees. Further it was Mr. Frempah's evidence that he did not tell Mr. Ansah about Exhibit #13 (Union = No Jobs) because Mr. Ansah told him the union activities were secret. Remember Mr. Ansah is not a union organizer. In cross-examination Mr. Frempah could not confirm the dates or times that the alleged conversations took place. Mr. Frempah states that he never spoke of specific dates with the Applicant's counsel nor did he mention March 3rd or 4th even though those are the dates that appear in the Applicant's counsels correspondence to the Board as the dates on which the alleged conversations took place. Mr. Frempah is unsure as to who else was there, first saying that he and Mr. Ansah were present and then indicating that a fellow employee George Adomah was also present. Even assuming his memory was not exact as to dates and times, he says when he spoke to him, Sam was leaving. The time cards however established that when Mr. Ansah was working during the week that Mr. Frempah allegedly spoke to him, Mr. Frempah was not on the same shift. Mr. Frempah further confirms that he did not tell union counsel about this conversation after having said it would not be a surprise or unusual for Mr. Ansah to come and talk to him about the union yet he says he spoke to Kingsley on the 4th because he thought it was a trick on Mr. Ansah's part, it was so strange to him. With respect, this whole line of testimony is a fabrication. Mr. Frempah alleges this conversation took place March 3 on production line 8 in the presence of Mr. Adomah even though the evidence discloses that Mr. Frempah worked as the packer on production line 5 that day. Mr. Frempah's testimony is replete with contradictions and changes in testimony. Everytime he is challenged his standard response is "I know Sam came and talked to me". Finally recognizing his contradictions, he says "the conversation could have taken place in February" after previously asserting the alleged conversations took place on March 3,4,and 5. The union witnesses have attempted through their testimony to discredit Mr. Ansah and have undertaken a campaign of retribution against Mr. Ansah for exercising his legal right to oppose the trade union. All of the Applicant's witnesses' testimony relative to Mr. Ansah is replete with significant inconsistencies directed at misleading the Board as to the role Mr. Ansah did play in this organizing campaign.

27. The Board has ordered a vote in circumstances that included merely the possibility of

intimidation. In *Waldorf-Astoria Hotel*, [1981] OLRB Rep. Sept. 1308, the Board stated that it was uncertain whether threats of job loss may have been made by the union's employee organizer. The Board was also concerned that the employee may have misrepresented himself. The employee was not available to testify before the Board. In the absence of this testimony the Board held that the possibility of the threat and the misrepresentation was sufficient to warrant a representation vote. The evidence in the *Royalguard* case is certainly sufficient to raise the possibility of intimidation to the extent that the membership evidence is unreliable. The company, in its cross-examination of the Applicant's employee organizers, disclosed as the majority found, significant inconsistencies in their testimony. This testimony impacts directly on the reliability of the membership evidence and I would have found that the credibility of the Applicant's witnesses was such that one cannot rely on their evidence in support of the membership evidence, therefore the evidence of the Applicant's witnesses was not sufficient to rebut the Respondent's allegations.

28. In challenging the membership evidence the Respondent assumed the onus of proving the membership evidence was unreliable on its face. By reason of the testimony of the Applicant's witnesses that onus has been met and serious doubt cast on the reliability of the membership evidence. When witnesses treat the integrity of the Board in such a cavalier manner as these witnesses did - by lying under oath day after day - it does not behoove this Board to reward such conduct. I would have allowed the employees at *Royalguard* to decide by secret ballot whether or not they want a union to represent them.

* * *

29. My dissent that accompanied the majority decision issued June 6, 1994 fully canvassed my concerns regarding the issuance of a "bottom-line" decision in this particular case, therefore I do not propose to reproduce them here. However in paragraph 48 the majority comments:

"It is also noted that the Board issued a bottom-line decision in a separate dispute that arose between the parties while the certification matter was being litigated without any objection on the part of either party".

30. The Board did during the course of the litigation on the merits hear a separate dispute between the parties involving an alleged violation of section 81 of the Act. following that "hearing within a hearing" the Board issued a bottom-line decision, then continued to hear the merits of the main case. The majority comment, noted above, proposes that failure to object to the issuance of a "bottom-line" decision on one matter precludes a party from objecting to the issuance of a "bottom-line" decision on another matter raised during the course of the same litigation. This proposition is not supported by the Board's practice or rules and is therefore inappropriate and prejudicial.

31. I would have granted the Respondent's request for reconsideration.

1615-93-M Practical Nurses Federation of Ontario, Applicant v. Select Living (1991) Ltd., Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board finding retirement home to be “hospital” within meaning of the *Hospital Labour Disputes Arbitration Act*

BEFORE: K. G. O’Neil, Vice-Chair, and Board Members R. W. Pirrie and E. G. Theobald.

DECISION OF THE BOARD; August 29, 1994

1. This is a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (referred to below sometimes as HLDAA). The question which has been referred to the Board for its advice is the following:

Is Barclay House a hospital within the meaning of the *Hospital Labour Disputes Arbitration Act*.

The parties have filed submissions with the Board and have agreed that an oral hearing is not necessary.

2. From the material filed, it is our advice to the Minister that Barclay House is a hospital, as it is a home for the aged. Our reasons for that advice follow.

3. The material discloses that Barclay House is a retirement home owned by Select Living (1991) Ltd. and is managed by Beacon Hill Lodges Management Inc. It is described in counsel’s submissions as a residential facility which provides basic accommodation, meals, companionship and social activity for its residents. It is said that Barclay House only accepts residents if they are capable of functioning without the assistance of others in regards to the activities of daily living, feeding, dressing and moving around the home and that due to the criteria for admission, all residents are fully independent and ambulatory, although ten residents walk with the assistance of walkers, and eight with the assistance of canes. Services are available for purchase from Barclay House which are not included in the price of basic accommodation. These include medication administration, bathing assistance, laundry service and daily housekeeping. At the time of the submissions, there were 60 residents, whose age ranged from sixty-five to ninety-seven.

4. The facilities contain sixty-three suites housing up to seventy-two private and semiprivate residents. Each suite has a four piece bath, but no kitchen facilities. The entrance door is from a common hallway which has a lock for which the resident controls the key, although staff have access to be used in the case of emergencies. Each room has a call bell which rings in the nursing station, and the nursing staff carry a beeper if they are away from it. Residents are permitted to come and go as they please, however they are asked to advise a staff member when leaving the building. All exit doors are locked at 7:00 p.m. each evening, and the alarms on the doors are triggered if, for example, a resident attempts to leave the building. There is a shared dining room, cafeteria, reception area, chapel, library, laundry facility and lounges. All meals are provided in a dining room and cafeteria, and room service is not available except for when a resident is ill.

5. The level of independence of the residents seems quite high. However, the residents are characterized generally as the frail elderly and there are residents who have the potential to be wanderers, some who are incontinent, and some with diabetes.

6. Staffing provides RNA coverage for day and evening shifts, one on each shift. Personal service attendants are available for more hours than that.

7. All residents require some form of medication but forty-two percent of the residents are self medicating. Registered Nursing Assistants and personal service attendants dispense medication, if an individual resident has contracted the service option of medication dispensing. This is the only "medical" service provided by the facility on a regular basis. Physicians make house calls and visit their patients in the residence, and services of outside agencies such as Red Cross or VON are sometimes provided at the home. Residents are also able to subscribe to a bathing option to receive assistance in bathing once a week.

8. The admission policy of Beacon Hill Lodge says that the facilities are intended to provide long term, supportive and/or restorative quality care, and thus it is necessary to limit admission to applicants for which the facility adequately provides such quality care. The occupancy agreement contains the following (part of paragraph 2):

The resident acknowledges that the owner provides general supervision of health care needs, but should any nursing care or other assistance be required by the resident in excess of that specifically set forth in the said Schedule "A", the resident and where applicable the guarantor agrees at their own expense to use the services of such qualified supplier of nursing care as it appears on Schedule "A" or such other qualified supplier as deemed appropriate by the owner from time to time.

And further (part of paragraph 6):

All resident care needs will be assessed quarterly by the personal care committee (Manager, Nursing Supervisor and Residence Physician). The resident further acknowledges that, due to the fact that the residence is not equipped to provide special or additional nursing or medical care, and [in] the event that the resident shall require special or additional nursing or medical care (as determined by the Resident Physician)... the owner shall be entitled to terminate this agreement.

9. On Schedule "A" the services provided are set out. Weekly housekeeping is provided by the owner. Daily housekeeping carries an extra cost, and is used by forty percent of the residents. Supply and laundering of sheets and towels are the home's responsibility, but personal laundry service is optional at an extra cost (used by twenty percent of residents). The fact that qualified nursing staff will be available twenty-four hours per day with sufficient support staff to provide supervision of health care needs is also mentioned on Schedule A. Additional personal nursing care is to be purchased by the resident. A self medication waiver is attached to the agreement as well which provides for a resident who is going to self medicate to be responsible for the administration of his own medications, and to not hold the owner responsible for any error associated with that. Further, it provides that the resident acknowledges that at some time in the future at the discretion of the residence nursing supervisor, the owner may deem the resident incapable of accurately monitoring and administering his own medication, and may take over these functions on the resident's behalf.

10. The job description for the RNA indicates that the major functions of an RNA include being a professional medical support for the residents of the Barclay House, assisting in co-ordinating care of the residents and assisting in monitoring and ensuring the maintenance of high standards of nursing assistance. It further requires the ability to understand and assess the demands of the residents. The specific duties include providing care to the residents of the retirement home within the guidelines of the College of Nurses for an RNA, to keep accurate records on each resident, including charting of any and all pertinent data regarding the resident as well as any significant change in the condition of the resident which would be vital knowledge in the medical treatment of this resident, and reporting to the resident's physician when warranted. This includes ordering, reordering, dispensing, administering and managing medications and treatments.

11. The disputed facts are minor and nothing turns on them for the purpose of this decision. The parties disagree on whether there is an RN employed as an RNA and as to whether some residents are waiting to move into nursing homes.

12. It is the employer's submission that what is fatal to the union's claim in this case is that the house is not operated for the "observation, care or treatment" of either category of persons set out in the definition of hospital in the *Hospital Labour Disputes Act*. Persons needing observation, care or treatment would be in a nursing home or a more active treatment centre, in the employer's submission. The employer submits that there are no elements of observation care or treatment with respect to any residents.

13. Further, the employer submits that the house is not a home for the aged. The employer quotes the Minister of Labour in the *Hawkesbury Villa* decision dated November 14, 1985:

"The words 'home for the aged' are to be given their plain and ordinary meaning in light of the purpose of the Act. The words suggest a residence for elderly individuals, the amenities of which and the services provided are shared in common. The intention of the legislation is to ensure that services provided by certain institutions to persons of advanced years who may be in a vulnerable physical or mental condition are not disrupted by reason of a work stoppage."

The employer submits that in that case the Minister of Labour focused on the residents' dependence on physical care and supervision provided by the Villa to justify declaring it to be a hospital. It was not the fact that an institution is a residence for aged persons that made the Minister of Labour determine it to be covered by the HLDAA, submits the employer. Rather, it was because the Minister felt he was satisfied that the residents received such personal care and assistance that its disruption would result in not only an inconvenience, but also discomfort and ultimately might jeopardize the physical well-being of the residents.

14. The employer argues that there would not be such a disruption in any such services due to a work stoppage because the residents can still be supplied with necessary care through management staff, and the compliance with the replacement worker provisions of the Act, sections 73.1 and 73.2 of the Act. In short, the purpose behind the HLDAA would not be advanced by determining that the house is a home for the aged, submits the employer. The employer urges the Board not to follow *Dignicare Incorporated c.o.b. as Orleans Community Health Centre*, (Divisional Court), File No. 462/90 February 12, 1991) as argued by the union.

15. The union asserts that most of the residents suffer from some kind of mental or physical limitations to varying degrees, and that they move into the home because they need some assistance with the tasks of daily living. This is more or less supported by the employer's submissions, although their emphasis is on the maintenance and encouragement of independent living.

16. The union relies on two cases. The first of them is *Dignicare Incorporated*, cited above. The court was dealing with orders of two Ministers of Labour who had ruled that the HLDAA did not apply to the employer's operation. The facts recited in that case indicate that although a doctor was on call, the Orleans Community Care Centre did not provide medical care or treatment to its residents. The court decided that the observation, care or treatment referred to in the HLDAA definition did not have to be of a medical nature and that the Ministers erred in so finding.

17. The second case relied on by the union is *Extendicare Diagnostic Services*, [1982] OLRB Rep. March 371, and in particular paragraphs 12 to 17 thereof. The paragraphs referred to specifically discuss the purpose of the HLDAA. The Board refers to the legislature's having determined that the need of the public to uninterrupted hospital services takes precedence over the right of certain individuals to resort to economic sanctions in support of collective bargaining objectives.

However, it points out that given the statutory encroachment on individual freedoms, the Board might be circumspect in applying the definition. In that case the Board concluded that the employees whose status was in issue were employed by an organization which is not a hospital. Their functions were available from the hospital on an uninterrupted fashion as an alternate to private suppliers. The Board therefore found it was difficult to conclude, given the balancing of interests which must take place, that the legislature intended to prevent the employees in question from engaging in free collective bargaining. The context of that case is very different from the one before us.

18. Management's reply to these submissions is that the policy reason for defining an employer's operations to be a hospital within the meaning of the HLDAA is to prevent work stoppages from disrupting essential health care services. In the absence of a disruption of these services, the free collective bargaining process should prevail. The employer submits that there is no evidence to suggest a work stoppage of four RNA's would disrupt the provision of services to the residence, as management and personal service attendants currently hand out medication, and provide care to residents. As well, management trains RNA's. Therefore they could continue to provide the service. Accordingly, the company submits that the policy behind the *Labour Relations Act*, free collective bargaining, should guide the Board to decide that the home is not a hospital within the meaning of HLDAA.

19. The union's submissions in reply emphasise that the RNA's and sometime the personal service attendants handle the charting for all residents, making regular monthly nursing notes on each resident, plus additional notes if something of importance occurs. They highlight the role of the residence physician. Although acknowledging that his use is optional, they note that the doctor takes care of approximately twenty out of the sixty residents whom he sees in the nursing station or in a resident's room.

20. The union further highlights that in order to be hired as a RNA by the employer, an RNA is required to have a medication and administration certificate which is not part of regular RNA training, but requires a further three month college course. Personal Service Attendants are not qualified or trained to give medication. However, it is submitted that since the Barclay House's facilities are not government regulated, presumably they are free to request personal service attendants to give out medication. The union also provided additional factual statements as follows in their reply. Barclay House advertises that it provides convalescent care for patients released from hospital, but not yet ready to care for themselves at home. Social workers regularly attend at the facility to deal with the residents suffering from confusion, depression and alcoholism. A gerontologist from the psychiatric hospital sees three residents at least three times per month. The union submits that people move into facilities such as the home for the very reason that they have difficulty living on their own. It is said that they require care and assistance with eating, bathing, medication, laundry and so on, and that they need and want twenty-four hour supervision. Further, the union disputes the employer's assertion that a strike or lockout would not disrupt any services provided to the persons at the home. It notes that the employer has difficulty hiring RNA's to fill its existing requirements on an ongoing basis, and that neither of the two existing management persons are qualified nurses, or even personal service attendants.

21. We have carefully considered the material before us. We view the statute in a manner consistent with that of the decision of the Divisional Court in *Dignicare Incorporated*, cited above, and therefore are persuaded that Barclay House should be covered by the HLDAA. We agree with the court's finding that observation does not have to be of a medical nature to be covered by the definition. From the material before us it is clear that a major component of the service offered by Barclay House is the observation and assessment of its aged residents. This is sufficient for it to

be covered by the HLDAA. Further, the legislature did not distinguish between homes for the aged with a relatively well population and those with a very dependent population.

22. We have considered the argument made by the employer about the purpose of HLDAA in light of the replacement worker provisions enacted in 1993. We are not of the view that it is appropriate to hold that they influence the definition of the word hospital in HLDAA in the way suggested. Although it may be that the replacement worker provisions mean that a strike would be less disruptive than without such provisions, we are not persuaded that they can be construed as changing the meaning of the words in the definition of hospital in the pre-existing HLDAA. If the legislature had wished to make such an intention clear it could have, but did not.

0152-94-M United Food and Commercial Workers International Union, AFL/CIO, CLC, Applicant v. Shirlon Plastics Inc., Responding Party

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *John Forster* for the applicant; *William R. Watson*, *Lisa Kirby* and *Sydney De Souza* for the responding party.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG;
August 8, 1994

I. Introduction

1. This is an application for an interim order under section 92.1 of the *Labour Relations Act*, which provides as follows:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

2. On April 19, 1994, after entertaining argument on behalf of the parties, the Board rendered the following oral decision:

1. The Board finds that the applicant has established an arguable case for the relief sought in the section 91 application.
2. With respect to the issue of the balance of harm, the Board finds as follows:
 - (a) with respect to Christopher Maile, the Board finds that the balance of harm favours the responding party;
 - (b) with respect to Jocelyn Robert, the Board finds that the balance of harm favours the applicant; and
 - (c) with respect to Anthony Moore, the Board (Board Member Rundle dissenting) finds that the balance of harm favours the applicant.
3. The Board (Board Member Rundle dissenting) orders Shirlon Plastics Inc. to reinstate Jocelyn Robert and Anthony Moore to their former employment, pending the disposition of Board File 0153-94-U.

4. The Board further orders Shirlon Plastics Inc. to post a Notice, to be forwarded by the Board, in prominent places in the workplace where it is most likely to be seen by its employees interested in these proceedings. The Notice shall remain posted for 60 consecutive working days or until the disposition of Board File 0153-94-U, whichever is earlier.
5. The reinstatement of Jocelyn Robert and Anthony Moore on an interim basis is made without compensation for lost wages and other remuneration. The issue of compensation is left to the panel dealing with the merits of the underlying section 91 application.
6. Reasons for this decision will follow at a later date.

These are the reasons for that decision.

3. This matter relates to Board File 0153-94-U (“the main application”) in which the applicant (“the union”) alleges that the responding party (“the employer”) has violated sections 3, 65, 67, 71 and 82 of the Act by terminating the employment of Christopher Maile, Anthony Moore and Jocelyn Robert, who comprised the three person employee committee responsible for the organization of the employer on behalf of the union. The application for interim relief was filed by the applicant on April 14, 1994 and came on for hearing before this panel on April 19, 1994. At the time we heard this interim application, the hearing of the main application was scheduled to commence on April 28, 1994.

4. In support of the request for interim relief, the union filed with its application the declarations of five individuals - the three affected employees (“the grievors”) the union organizer (Mr. John Forster) and Mrs. Connie Maile, a parent of Christopher Maile. In general terms, the declarations describe the commencement of the organizing campaign - the initial meeting between Mr. Forster and the three grievors - and the first steps taken by the grievors to enquire of other employees of their interest in becoming members of the union. The declarations outline the evidence in the possession of the declarants which cause them to believe that management of the employer became aware of the three grievors’ involvement with the union. The declarations also outline the negative effect that the terminations of employment have had on the organizing drive.

5. The declarations filed by the employer in support of its position are extremely detailed and comprehensive. Specific incidents during the course of employment which speak to the harm which would be the result of interim reinstatement of each of the grievors are described in the declarations. These events are to a great extent not mentioned by the grievors in their declarations. Before dealing with the substance of the case, we wish to outline our view of the applicable legal principles which have been developed by the Board to date regarding the issuance of interim orders.

II. The Law

6. A two-part test to determine whether an interim order should issue has been established by the Board. The first branch of the test requires the Board to be satisfied, on the basis of the written declarations before it, that an “arguable case” for the remedies requested in the main application has been made out by the applicant. As was pointed out by the Board in *Loeb Highland* [1993] OLRB Rep. Mar. 197 at paragraph 26:

... we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant’s assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act.

7. The second branch of the test requires the Board, by reference to the written declarations of the parties, to consider the relative harm which may result from granting or not granting the interim order sought. The Board in *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. Apr. 358, described this branch of the test as follows (at paragraph 18):

There must be some danger of possible significant harm to the applicant before the Board will grant the relief being sought. Furthermore, that harm must be more significant than the possible harm which may result to the responding party if the order sought is granted.

In *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019, the Board described the assessment to be made in the following terms (at paragraph 55):

... it is necessary to consider what "harm" may occur if an interim order is not granted, and what "harm" may occur if it is granted; moreover, that assessment should be made from a labour relations perspective, having regard to the scheme and purpose of the Act, of which section 92.1 is a part. In our view, the interests to be considered include those of the employer, the union, the aggrieved employees, and other employees in the work place who might be effected [sic] by the conduct under review.

8. Board jurisprudence dealing with the application of section 92.1 of the Act is still in its infancy. It is, accordingly, fair to say that the full range of the types or nature of the potential harm relevant for the purposes of the balancing of relative harm has not yet been determined by the Board, if it ever could be exhaustively determined. As has been noted many times before, each and every interim relief application is dependent upon the particular facts before the Board. That being so, Board decisions to date do identify some common threads which weave through interim order applications. It is clear, for example, that the power to grant interim orders should not be exercised by the Board if the harm to be avoided is purely or predominantly financial in nature. See, for example, *Morrison Meat Packers Limited*, *supra*, at paragraph 23; *Price Club Canada Inc.*, [1993] OLRB Rep. July 635 at paragraph 16; *Bryan Forde* [1993] OLRB Rep. Dec. 1296 at paragraph 35; and *Fort Erie Duty Free Shoppe Inc.*, [1993] OLRB Rep. Dec. 1307 at paragraph 24.

III. The Parties' Positions

9. The Board asked counsel for the responding party to proceed first with his argument. Counsel submitted that the applicant had not satisfied either branch of the test developed by the Board for the granting of interim relief. Counsel observed that the employer's declarations refute a number of allegations made in the declarations filed by the applicant. A number of discrepancies in the applicant's declarations were highlighted, in particular the allegation that Mr. Maile had completed his probationary period with the employer. Counsel noted as well that the declarations of the employer supported, in detail, the contention that Mr. Moore had quit his employment rather than being fired from employment as is alleged by Mr. Moore.

10. It was conceded by counsel that, for the purposes of determining the existence of an arguable case, the declarations filed by the applicant should be relied upon by the Board. Counsel submitted that the declarations were flawed insofar as there was no allegation contained in the declarations that the employer had any knowledge of the organizing campaign. In essence, counsel submitted that there was an insufficient linkage between the facts contained in the applicant's declarations and the conclusion that management knew of the organizing campaign, and in particular the involvement of the grievors.

11. With respect to the issue of balance of harm, counsel reviewed each grievor separately. As a general observation, counsel noted that the union's declarations established that, as at the date that the first grievor ceased employment, no membership cards had been signed except for

those of the grievors. He noted that the signing of other memberships happened *subsequent* to the cessation of employment of both Mr. Moore and Mr. Maile, and submitted that the real start of the organizing campaign post-dated the departure of these two grievors from employment. Counsel noted the apparent conflict in the applicant's declarations, reflected by the grievors' declarations that some of their former coworkers have indicated a fear for their job if a union card is signed. Counsel wondered how this could be so given the fact that a number of membership cards were signed after the cessation of employment of both Mr. Moore and Mr. Maile.

12. With respect to the individual grievors, counsel dealt first with Mr. Maile. The employer's declarations, which outline a series of workplace accidents by Mr. Maile when driving the employer's forklift, were emphasized by counsel. He noted that the employer had, both verbally and in writing, warned Mr. Maile regarding the accidents and had requested from him proof that he had formal training in operating a forklift. No such proof of training was ever provided by Mr. Maile to the employer. The last incident involving the forklift was immediately prior to Mr. Maile's termination from employment. Counsel submitted that the harm to the employer of reinstating Mr. Maile was twofold: first, his ongoing employment would affect the possible completion of the three months probationary period, thereby affecting what was described as 'the standard' probationary period. Second, and most importantly, this employee had a poor safety record and it would be unsafe to continue his employment, even for the interim period prior to the determination of the application on its merits.

13. With regard to Mr. Moore, counsel again emphasized the discrepancies in the declarations provided by the parties. Counsel submitted that Mr. Moore had quit his employment as a result of a dispute regarding a raise or bonus that he alleged had been promised to him. Counsel focused on the insolent manner attributed to Mr. Moore in the employer's declarations, and submitted that it reflected someone who is "out of control", and who in essence "thumbed his nose" at management in a prominent and dramatic way. Counsel submitted that reinstating this individual to employment would send the message that "self help" is an appropriate means of seeking a remedy to a dispute in the workplace.

14. With respect to Ms. Robert, counsel conceded that she is considered by the employer to be a good, productive employee. Counsel noted that the employer's declarations establish that Ms. Robert cannot "get along with" visible minorities in the workplace. Counsel focused on a series of escalating incidents with 3 separate employees which included verbal harassment and physical assault, and noted that Ms. Robert had previously been transferred to the day shift in order for management to keep a closer eye on her. It was observed that these steps had had no effect on Ms. Robert. Counsel submitted that the employer had concerns regarding her reinstatement to employment as a result of the obligations imposed on it by virtue of the *Human Rights Code*, R.S.O. 1990, c.H-19, but acknowledged that should it be required, the employer could deal with these problems.

15. It was the applicant's position that the declarations filed by the applicant provided a sufficient linkage so as to establish an arguable case in the main application. The representative of the applicant submitted that the date of signing of membership cards was irrelevant, and that the critical fact was the timing of the commencement of the organizing campaign and the termination of employment of the three in-plant organizers. It was submitted that reinstatement with full compensation pending the disposition of the section 91 application was the only way to remedy the situation. Mr. Forster then turned to the issue of balance of harm.

16. With respect to Mr. Maile, Mr. Forster submitted that the Board should question whether Mr. Maile truly had safety problems with the forklift. It was pointed out that, subsequent to the warning letter produced by the employer early in the employment relationship, no further

written warnings had been issued to Mr. Maile. It was submitted that there would be no undue hardship imposed on the employer to require Mr. Maile to return to the shipping department for the interim period, doing what he previously did. With respect to Mr. Moore, the applicant's representative submitted that no hardship would befall the employer should he, too, be returned to work pending the determination of the main application, and submitted that irreparable harm would result to the union if one of its main organizers was not returned to work.

17. With respect to Ms. Robert, Mr. Forster submitted that the incidents described in the declarations of the employer do not reflect 'meaningful' events. He focused on her good productivity and noted that if she were not returned to work other employees would perceive that she was being punished for supporting a union. This would result in the intimidation of the employees as a whole.

IV. Reasons for Decision

18. In our view, the applicant has established an arguable case that there has been a breach of the Act. As noted above, the Board's task is to assess whether there exists an arguable case that a breach of the Act may have been committed. The declarations filed by the applicant which are before us establish such an arguable case. The declarations, on their face, describe the extent of the organizing campaign, the involvement of the three grievors in that campaign, and contain some factual allegations which allow for the conclusion that the employer could arguably have breached the Act. With respect to grievors Maile and Moore, there is evidence of their open communication with other employees regarding interest in the union, and the subsequent cessation of their employment. With respect to Ms. Robert, there is evidence in the declarations of Mr. Forster and Ms. Robert that at least one, but possibly up to three, members of management saw her speaking with Mr. Forster and the other two grievors one day prior to her termination from employment. In our view, such evidence is satisfactory to establish an arguable case that a violation of the Act may have occurred.

19. It was the argument of the employer that an arguable case had not been established because the applicant had not alleged that management was aware of the organizing drive, or, in Ms. Robert's case, that the management representatives could have identified Mr. Forster even if they did observe him with Ms. Robert. In our view, the approach urged upon the Board by the employer imposes a far too stringent standard upon the applicant. In section 91 complaints alleging a breach of sections 65, 67, or 71 of the Act, the responding party often has the burden of proof and is required by the Board to proceed first. The rationale behind such a requirement is simple - it is only the employer which knows the full circumstances behind the reason for the impugned conduct. Similarly, in interim applications in the nature of the one before the Board, it is unlikely that the applicant would be able to assert, in signed declarations which attest to the accuracy of their contents, the exact pathway upon which the news of the organizing attempt may have travelled to the employer. Obviously, if that pathway can be identified from first-hand sources it is in the best interests of the applicant to do so by way of signed declarations. But, in our view, it is unnecessary for applicants to make "guesses" as to how management may have learned of the organizing campaign, and the absence of evidence of a pathway of information does not establish a fatal gap in the declarations.

20. Neither does the failure to declare that Mr. Forster was identifiable by the management of the employer. In our view, the evidence establishes that an organizing campaign had commenced at this place of employment, and that there was discussion by employees about the possibility of joining a union. The three grievors were central to those discussions. The observance by members of management of Ms. Roberts outside of the plant with two individuals who had previ-

ously been fired, allegedly for their participation in the organizing campaign in our view establishes an arguable case that a breach of the Act *may* have been committed.

21. At this point, the Board feels it necessary to comment upon the nature of the materials before it. As noted above, the application was supported by five typewritten declarations. In our view, the declarations were, to a certain extent, lacking in specificity. They also seemed to be incomplete in some respects. As an example, the three grievors, for the most part, make no reference in their declarations to their disciplinary records or to any other matters that the employer may have raised regarding the potential harm of reinstating them to employment. The exception to this was Mr. Maile, who states in his declaration that “Nothing was ever said to me before [my termination] about a safety problem ...”. This would appear, based on the declarations and written warning produced by the employer, to be patently inaccurate. The only other reference to the grievors’ work records is made by Mr. Forster, who states in his declaration that “According to my information all three terminated employees completed their tasks well, had good attendance records, and no letters of discipline on file”. This is not first hand information and is unhelpful to the Board. As an aside, it also appears, based on the materials filed by the employer, to be entirely inaccurate. Mr. Forster during argument candidly acknowledged that at least one other part of his declaration was inaccurate. It was evident to the Board that the inaccuracy was one which could easily have been avoided should Mr. Forster have more carefully considered the accuracy of the description of the event to which he was attesting.

22. The Board is sensitive to the fact that these applications are developed, filed, and heard in an expedited fashion. In the event that a significant delay occurs, the application may be dismissed for this reason (see, for example, *William Neilson Ltd.*, [1994] OLRB Rep. Mar. 326). The Board is also aware of the difficulty that the applicant may have in attempting to anticipate the argument of the employer when preparing its declarations. It is, however, our view that a high degree of thought and care must be taken when preparing the declarations to be filed in an interim order application. The declarations are the only materials before the panel of the Board determining the application for interim relief and are, therefore, of paramount importance. The declarations must be full and completely set out all relevant facts in the possession of the declarants. It is not satisfactory to prepare and file declarations of a ‘boilerplate’ nature which are designed to ‘pick’ and ‘choose’ facts or which are incomplete and therefore of dubious quality. As noted by counsel for the employer, the applicant had approximately two weeks to prepare its materials (as compared with 48 hours for the employer). In light of that fact, the applicant should provide the Board with full and complete declarations in support of its application. Applicants which omit essential facts take the risk that their recitations of fact contained in the declarations may not be accepted by the Board as reliable, and therefore that the application for interim relief will be determined solely by reference to the employer’s declarations.

23. With these comments in mind, we consider the issue of balance of harm. We will do so for each of the three grievors separately.

(a) Christopher Maile

24. In our view, the balance of harm with respect to the interim reinstatement of Mr. Maile favours the employer. In the applicant’s favour, the conduct in dispute consists of the termination of employment of an inside organizer during the course of an organizing campaign. As was observed by the Board in *Loeb Highland, supra*, and *Tate Andale Canada Inc., supra*, the termination of an inside organizer during the course of an organizing campaign establishes a significant harm to the union (over and above the harm which inherently occurs to the employee organizer). Accordingly, the potential harm of not granting the interim order in Mr. Maile’s case is significant.

25. To be balanced against the harm described above is the harm identified by the employer in its declarations. As a general observation, the harm identified by the employer in this case relates to the health and safety of those working in the plant, including Mr. Maile himself. The employer's declarations suggest that Mr. Maile has had a substantial accident history during the short time he has been employed by the employer. Mr. Maile was employed in the shipping and receiving department of the employer and as part of his job he was required to operate a forklift. Mr. Maile was hired on January 20, 1994. Within 8 days of his hiring, Mr. Maile had both damaged a machine with the forklift and crashed the forklift into the wall of the Plant Office as a result of driving the forklift at a high rate of speed. These two incidents resulted first in a verbal warning and then, on January 28, 1994, a subsequent written warning.

26. The declarations submitted by the employer suggest that just over two weeks later, on February 15, 1994, while operating the forklift Mr. Maile dropped a pallet with a number of cartons weighing approximately 30 lbs. each on a spot where an employee had just previously been working. Subsequently, on March 30, 1994, Mr. Maile was using the forklift to stack a pallet loaded with cartons of garden hose on top of another pallet and dropped the cartons, each carton again weighing 30 lbs. The cartons were thrown off the pallet in an area occupied by a number of machine operators working on plant machinery. According to the declaration of Mr. Mohamed, the Group Leader in this department, his investigation of the accident disclosed that other workers had been endangered by Mr. Maile's conduct on this occasion. Mr. Mohamed thereupon assigned Mr. Maile to other duties on March 31, 1994, which was the date of Mr. Maile's termination from employment.

27. There can be no doubt that legitimate health and safety concerns of an employer are considerations which ought to be taken into account by the Board when assessing the balance of harm. Employers and supervisors are obliged to take every precaution reasonable in the circumstances for the protection of workers (section 25(2)(h) and section 27(2)(c) respectively, of the *Occupational Health and Safety Act*, R.S.O. 1990, c.0.1, as amended). Legitimate health and safety concerns are, therefore, a 'harm' which the Board should weigh in favour of a party to an interim order application such as the one before this panel. However, it is not enough for the employer to merely allege that significant health or safety risks will result to the employer and/or others should the employee in question be returned to his prior employment. In order to satisfy the Board that such concerns are sufficiently serious to warrant significance for the purposes of refusing an interim order that would otherwise issue, the employer must, through its declarations, establish that demonstrable health or safety risks may result should the employee be reinstated to his or her position for the interim period prior to the disposition of the underlying application. There should be evidence before the Board which would lead the Board to believe that there is a risk of unsafe conduct occurring should the employee be reinstated for the interim period pending the disposition of the main application. It will, of course, be the decision of the panel of the Board seized with the interim order application to decide whether, on balance, the health and safety concerns of the employer, added to any other harm demonstrated by the employer, outweigh the harm(s) identified by the applicant which would result from not returning the employee to work. This will, in our view, require the Board to consider such factors as the probability of the unsafe conduct occurring, the probability of injury or damage happening from such an occurrence, and the seriousness of the likely damage or injury which would result from such an occurrence.

28. In the case before us, the Board is satisfied that the employer has provided sufficient evidence of demonstrable health and safety risks should Mr. Maile be reinstated to his position in the shipping and receiving department for the interim period prior to the disposition of the main application. Mr. Maile had, prior to his termination, been employed for just over 2 months with the employer. His safety record in that period of time is poor. The materials before the Board sug-

gest that, save for some fortuitous circumstances, at least one employee (but very possibly more) could have been seriously injured as a result of Mr. Maile's conduct during that 2-month period. The skill of Mr. Maile in operating the forklift does not appear to have improved over time, as is evident from the most recent incident which occurred just prior to his termination from employment. In our view, the evidence before us establishes that it is possible that an accident could occur should Mr. Maile be returned to employment. Most importantly, such an accident would likely involve significant injury to Mr. Maile or other employees of the employer. In these circumstances, we are of the view that the balance of harm, taking into account all of the factors described above, lies in favour of the responding party. Accordingly, we dismissed this application insofar as it relates to Mr. Maile.

(b) Jocelyn Robert

29. With regards to Ms. Robert, the harm which accrues in the favour of the applicant is that same harm which was identified and discussed above in paragraph 24 - the harm to the organizing drive when a key inside organizer is terminated from employment during the course of the drive. No other harm, save and except financial harm to Ms. Robert, was identified in the applicant's declarations.

30. As noted above, the employer asserted that Ms. Robert does not "get along with" visible minorities in the workplace and emphasized the escalating verbal and physical harassment that Ms. Robert has allegedly initiated. The employer identified concerns that it may well be liable for some of Ms. Robert's further conduct of this nature by virtue of the *Human Rights Code*, should she be returned to the workplace.

31. In our view, these concerns are also legitimate concerns to be weighed when assessing the balance of harm in any particular case. They are, to some extent, similar in nature to the health and safety concerns identified above with respect to Mr. Maile, insofar as the evidence before the Board in any particular case may well suggest that, because of the employee's past behaviour, the balance of harm lies in favour of the employer, and that the Board should therefore not reinstate the individual to employment pending the determination of the section 91 application. In our view, the evidence should disclose previous potential human rights violations by the employee. There should also be some evidence which suggests that it is probable that these types of incidents will continue should the employee be reinstated on an interim basis.

32. In this case, we do not believe that the employer has by its declarations provided sufficient evidence of the required degree of serious conduct which would lead the Board to find that the balance of harm favoured the employer. There is no doubt that the declarations filed by the employer establish that Ms. Robert has had altercations with three other employees in the plant since January, 1994. The reasons for the altercations and their extent are, however, to a great degree indeterminate, as the employer's declarations are couched in general terms and are lacking detail. Ms. Robert makes no reference to these events in her declaration. None of the employees who have been allegedly abused have provided declarations suggesting any racial basis for the altercations. There is not, on the record before us, sufficient detail to lead us to conclude that the harm to the employer outweighs that harm which accrues to the applicant. On balance, we therefore are of the view that the balance of harm favours the applicant. Even if the events are as significant as alleged by the employer, in our view they are not so extreme as to tip the balance of harm in the favour of the employer. Accordingly, we granted the interim relief requested with respect to Ms. Robert.

(c) Anthony Moore

33. Once again, the harm accruing to the applicant is the harm described in paragraph 24 - the harm to an organizing drive when a key inside organizer is terminated from employment during an organizing campaign. The issue before the Board is whether the employer has provided evidence of sufficient harm to cause the Board to conclude that the balance of harm favours the employer in the circumstances. The majority of the Board concludes that the balance of harm falls in favour of the applicant in this case.

34. As noted earlier, the declarations provided by the parties with respect to the termination of employment of Mr. Moore are positioned at two ends of a spectrum. Mr. Moore alleges that Mr. De Sousa terminated his employment. Mr. De Sousa and the other declarants on behalf of the employer allege that Mr. Moore, in an insolent manner, walked away from the plant and never returned.

35. For the purposes of assessing the relative harms, we have considered the declarations of both the applicant and the employer. The declarations of the employer are fuller and describe events *not* contained in the applicant's declarations. For the purposes of determining the balance of harm the Board is willing to assume that the behaviour of Mr. Moore was as described by the employer's declarations. However, on balance we do not view the harm as described in the declarations to be so severe as to outweigh the harm which would accrue to the applicant should an interim reinstatement order not be made.

36. In essence, the employer alleges that, two weeks prior to Mr. Moore's termination, Mr. Moore approached Mr. De Sousa demanding that a bonus be paid to him. Mr. De Sousa rejected his request, which rejection led Mr. Moore to kick a door in the plant and clock out in advance of the end of his usual quitting time. Mr. Moore apologized the next day and was warned by Mr. De Sousa about this conduct. Two weeks later, Mr. Moore requested a raise from Mr. De Sousa and, when rebuffed once again, he swore at Mr. De Sousa and Mr. Algranti, the president of the employer, in the presence of office staff. Similar conduct was repeated later that same day, with Mr. Moore again punching out early, never to return.

37. The above facts, if assumed true, obviously disclose conduct which is improper for the workplace. That being said, however, the conduct of Mr. Moore, even if assumed to be as described by the employer, is not so egregious or outrageous as to permit for the characterization of Mr. Moore as being "out of control" should he be reinstated for an interim period pending the disposition of the s.91 complaint. We have no doubt that an employee may conduct himself or herself so egregiously prior to his or her termination that the Board may decide, on those facts, to not reinstate the individual to employment, even on an interim basis. Such a level of conduct of behaviour has not been demonstrated on the facts of this case. Accordingly, a majority of the Board, Board Member Rundle dissenting, found that the balance of harm favoured the union, and ordered that Mr. Moore be reinstated on an interim basis.

(d) Compensation

38. The union's representative requested that the Board reinstate the grievors with full compensation to the date of reinstatement. The Board declines to do so. As a general observation, the Board is of the view that the decision to order payment of compensation for the period of time up to the time of the interim order should be left to the panel deciding the underlying section 91 application. To order compensation to be paid at this time would require extraordinary circumstances, which are not present before us.

39. For the reasons set out above, the Board made the order dated April 19, 1994.

DECISION OF BOARD MEMBER J. A. RUNDLE; August 8, 1994

1. Due to the serious and sensitive nature of the allegations respecting Ms. Robert contained in the respondent's declarations, I would not have reinstated Ms. Robert. The respondent's declarations disclose a pattern of behaviour on the part of Ms. Robert that in my view should lead the Board to conclude the balance of harm favours the respondent. Further the impact on Ms. Robert's co-workers whom she is alleged to have harassed both verbally and physically is another factor to which I would have given weight in concluding the balance of harm favoured the employer.

2. The respondents declarations also disclose a pattern of behaviour on the part of Mr. Moore that would lead me to conclude the balance of harm favours the respondent's position. Mr. Moore received a verbal warning on March 15 for conduct on March 14. Mr. Moore's conduct on March 28, while dealing with the same subject matter as the March 14 incident, escalated to another level. Mr. Moore on March 28 when advised he would not receive a raise was verbally abusive to the president of the company, challenged managerial authority and knowingly violated company rules. Mr. Moore punched out that day, March 28, never reporting for his shift the next or any subsequent shifts thereafter. This pattern of conduct on the part of Mr. Moore should lead the Board to conclude that Mr. Moore walked away from his job and never returned, therefore the balance of harm falls in favour of the respondent.

3. The respondent's filed as the majority states, "extremely detailed and comprehensive declarations" in support of its position. The incidents mentioned in the respondents declaration in support of their position are not to a large extent mentioned in the applicant's declarations. I endorse the comments in paragraphs 21 and 22 of the majority decision. The importance of the declarations is set out in *William Neilson Ltd.*, [1994] OLRB Rep. Mar. 188 where the Board states at paragraph 6:

"It is noteworthy to observe that the assessment made by the Board as to whether an "arguable case" exists or a remedy in the main application is one made by reference to the one or more declarations filed by the applicant. Consistent with the principle that interim orders should be granted in an expeditious manner, the Board's Rules of Procedure do not allow for cross-examination on the declarations filed by the parties. Accordingly, the Board is not in a position to make factual determinations in situations where the declarations of the parties disclose contradictory factual allegations. As a result, the Board will consider the first hand factual allegations made in the declaration(s) filed by the applicant. The Board assesses whether the facts described by the declarants make it at the very least an arguable case that a breach of the Act may have been committed."

4. The declarations in the case at hand disclosed contradictory factual allegations which leads in my view to a most unsatisfactory adjudicative decision. A much more satisfactory solution from a labour relations perspective in a situation where the parties positions as evidenced by the declarations are so diametrically opposed is to stand down the interim order hearing and have the case proceed on the merits in an expedited fashion. This solution which is available by statute to the Board preserves the underlying intent of the interim orders provision of the Act while allowing for a more satisfactory labour relations result. In all interim order applications the merits are heard on an expedited basis within 7 to 10 days following the section 92.1 application. Further, the respondent bears a reverse onus to prove their case in either the interim order application or the merits, therefore why not expedite the matter and hear the merits as quickly as possible.

5. In discussing Ms. Robert's case the majority at paragraph 31 outlines what the evidence

should disclose in order to assess where the harm lies. With respect, I do not agree with the nature of the evidence required. It would appear that the majority is requiring more than one incident of "human rights violations" and requiring evidence to prove incidents of this sort will occur in the future". In situations involving incidents as sensitive as we find in Ms. Robert's case employers responses are governed by the requirements of the *Human Rights Code*. A response that appears to be contrary to the response envisaged by this Board.

6. For the above reasons I would not have reinstated Ms. Robert or Mr. Moore on an interim basis.

1041-94-U Grant Tadman, Applicant v. Ontario English Catholic Teachers' Association Toronto Secondary Unit, Responding Party v. Metropolitan Separate School Board, Intervenor

Charter of Rights and Freedoms - Constitutional Law - Duty of Fair Representation - School Boards and Teachers Collective Negotiations Act - Unfair Labour Practice - Board rejecting submission that section 2(1)(f) of the *Labour Relations Act* violating section 7 of the Charter by depriving teachers of the right to bring complaints of unfair representation against their bargaining agent - Board without jurisdiction to deal with application - Application dismissed

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *J. A. Ronson* and *J. Redshaw*.

DECISION OF THE BOARD; August 22, 1994

1. This is an application under section 91 of the *Labour Relations Act* alleging that the responding party has contravened section 69 of the Act. Section 69 deals with a union's duty of fair representation towards employees in the bargaining unit.
2. The applicant is a teacher as defined in *The School Boards and Teachers Collective Negotiations Act*. His bargaining agent is the responding party, the Ontario English Catholic Teachers' Association Toronto Secondary Unit.
3. The applicant alleges that the responding party breached its duty under section 69 of the *Labour Relations Act* in failing to proceed to arbitration with respect to his compensation grievance.
4. The responding party and the intervenor, The Metropolitan Separate School Board, took the position at the outset that the Labour Relations Board has no jurisdiction to deal with this application by virtue of section 2(1)(f) of the *Labour Relations Act*.
5. Section 2(1)(f) of the *Labour Relations Act* states that it does not apply to a teacher as defined in *The School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.
6. *The School Boards and Teachers Collective Negotiations Act* does not confer jurisdiction on the Board with respect to an allegation of unfair representation brought by a teacher against

his/her bargaining agent. (*Franca Giannotta v. Ontario English Catholic Teachers' Association* (April 28, 1994 - Board File No. 4521-93-U).

7. The applicant then took the position that section 2(1)(f) of the *Labour Relations Act* violates section 7 of the *Canadian Charter of Rights and Freedoms* by depriving teachers of the right to bring complaints of unfair representation against their bargaining agent.

8. The applicant was directed to provide the Board, the responding party and the intervenor with detailed written representations on the Charter argument. They were also asked to indicate whether evidence will be required and why an oral hearing on this issue was required. The applicant filed its written representations and indicated that it did not intend to call any evidence with respect to the argument that section 2(1)(f) violates section 7 of the Charter.

9. Having reviewed the detailed written submissions of the applicant on this issue, the Board has determined that it does not require a response from the responding party or the intervenor and that it is prepared to decide the preliminary issue on the basis of the applicant's written representations. For the reasons set out below, the Board has determined that section 2(1)(f) of the *Labour Relations Act* does not violate section 7 of the Charter.

10. Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. The applicant argues that the exclusion of teachers from the protection of section 69 of the *Labour Relations Act*, coupled with the absence of an alternative forum for teachers to resolve issues of fair representation against their unions, violates the rights guaranteed under section 7 of the Charter. The applicant argues that restricting the employee's right to hold its union accountable for a breach of its duty of fair representation "would severely hamper an employee's ability to work at his chosen profession". He also asserts that a common law right to sue for breach of duty of fair representation would be an inadequate alternative to an application under section 69 of the *Labour Relations Act*.

12. The applicant states that "the rights of teachers affected by the impugned legislation are not merely economic rights but involve the right to practice a profession and to enjoy the amenities thereof. Such rights attract the protection of section 7 of the Charter." The applicant cites no case law in support of this proposition.

13. A section 7 analysis involves two steps:

To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice. *R v. Beare* [1988] 2 S.C.R. 387 at 401.

14. In Ontario, the Courts have rejected an overly broad approach to the rights protected under section 7 of the Charter. Ontario Courts have consistently held that the expression "liberty and security of the person" in section 7 relates to a person's physical and mental integrity and ones control over these. Ontario Courts have held that section 7 does *not* guarantee economic interests, including the right to carry on a business or earn a livelihood or the right to engage in a particular profession or occupation or in professional activity in any particular regulated economic sector. (*Cosyns v. Attorney General of Canada et al* (1992) 7 O.R. (3d) 641 (Div. Ct.) at 652-654). The Ontario Courts have specifically rejected the argument that the right to practice a profession or calling falls within the ambit of section 7 (*Feldman v. Law Society of Upper Canada* (unreported), December 9, 1987, (Ont. Div. Ct.); *Guthrie v. Ontario Association of Architects* (1988) 29 O.A.C.

(Div. Ct.) 146 at 148; *R v. Quesnel* (1985) 53 O.R. (2d) 338 (C.A.) at 346. See also *Hemlo Gold-mines Inc.*, [1993] OLRB Rep. March 158 at paragraph 28).

15. Based on the case law in Ontario today, this Board finds that section 2(1)(f) of the *Labour Relations Act*, to the extent that it denies the applicant the right to file a complaint alleging a breach of the duty of fair representation against its bargaining agent pursuant to section 69 of the *Labour Relations Act*, does not affect the applicant's right to life, liberty or security of the person.

16. In addition, the applicant argues that section 2(1)(f) is "void for vagueness and lacks the specificity necessary to constitute 'law'". The applicant cites no authorities for this proposition. The Board does not find section 2(1)(f) of the *Labour Relations Act* vague nor lacking in specificity. This argument is rejected.

17. The applicant further argues that the incorporation by reference of *The School Boards and Teachers Collective Negotiations Act* which in turn incorporates by reference *The Education Act*, constitutes an unlawful delegation of legislative authority. No authorities are cited for this proposition. The Board rejects this argument as well.

18. As stated above, the applicant is a teacher as defined in *The School Boards and Teachers Collective Negotiations Act*. By virtue of section 2(1)(f), the *Labour Relations Act* does not apply to teachers except to the extent provided in *The School Boards and Teachers Collective Negotiations Act*. That Act does not confer jurisdiction on the Board with respect to an allegation of unfair representation brought by a teacher against its bargaining agent. Therefore the Labour Relations Board has no jurisdiction to deal with this complaint and it is hereby dismissed.

4060-93-R The Ontario Secondary School Teachers' Federation, Applicant v. The Board of Education for the City of Toronto, Responding Party

Trade Union - Trade Union Status - Union Successor Status - OSSTF applying for declaration that it is successor union to Association of Schedule II Employees - Board concluding that fact that Association's constitution permits admission of non-employees and that it in fact does so would not in itself prevent Association from being considered a trade union within meaning of the Act - Parties directed to meet for pre-hearing conference

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *R. W. Pirrie* and *B. L. Armstrong*.

APPEARANCES: *Eric del Junco*, *Shirley Dufour*, *Rick Sevier* and *Brian Wright* for the applicant; *Stephen C. Raymond*, *Brian E. Goodard* and *John Bruce* for the responding party.

DECISION OF THE BOARD; August 30, 1994

1. This is an application for a declaration concerning the status of a successor trade union pursuant to the provisions of section 63 of the *Labour Relations Act*.

2. The applicant Ontario Secondary School Teachers' Federation ("OSSTF") seeks a declaration that it is the successor trade union to and therefore has acquired the bargaining rights for-

merly held by the “Association of Schedule II Employees Level 1-6, Inclusive” (“the Association”). The responding party Board of Education for the City of Toronto (“the employer”) resists the application, asserting that, among other things, the Association was not a “trade union” within the meaning of the Act because it permitted entry into its membership of persons performing managerial functions.

3. The definition of “trade union” is set out in section 1(1) of the Act, which provides as follows:

1.- (1) In this Act,

• • •

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

4. Section 1(3) of the Act, restricts the meaning of the term “employee” in the following manner:

1.- (3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

5. The parties to the present application met in a pre-hearing conference on June 30, 1994 during which it was determined that, failing settlement of the matter, the parties would address the following issue without the need for calling any evidence:

Assuming that the constitution of the Association of Schedule II Employees of the Board of Education of the City of Toronto permits the admission into membership of persons who would be excluded from the provisions of the definition of “employee” under section 1(3) of the *Labour Relations Act* and assuming that at least one such person has been so admitted, does that preclude a finding by the Board that the Association was a trade union under the Act.

No settlement was reached, and a hearing was held on July 22, 1994 before the present panel, during which the parties presented their submissions with respect to the above issue.

6. Having considered those submissions the Board is satisfied that the admission into membership of the Association, whether or not permitted by its constitution, of persons who are not “employees” within the meaning of section 1(3) of the Act is not in itself a factor that would lead the Board to conclude that the Association is not a “trade union”.

7. The Board has on numerous occasions considered the question of whether non-employee membership would preclude an organization from being considered a “trade union”. Although at one time the Board held otherwise, (see *Hydro-Electric Power Commission of Ontario* (“HEPCO”), [1971] OLRB Rep. Aug. 501) the clear thrust of the Board’s approach for at least the last decade is that the mere fact of membership of non-employees does not preclude an organization from being considered a trade union. The Board has expressly and repeatedly rejected the interpretation, advanced by the employer in the present application, that the definitional language “organization of employees” in section 1(1) serves a gate-keeper function that necessarily precludes an organization that admits non-employee members from activating the statutory rights accorded to trade unions. (See *Ottawa General Hospital*, [1974] OLRB Rep. Oct. 714; *Board of Education for the City of York* (“York I”), [1984] OLRB Rep. Sept. 1279; *Board of Education for the City of York* (“York II”), [1985] OLRB Rep. May 767; *The Board of Education for the City of*

Windsor, [1986] OLRB Rep. Mar. 378; *Etna Foods of Windsor*, [1986] OLRB Rep. June 710; *Ontario Hydro* (“*Hydro I*”), [1989] OLRB Rep. Feb. 185; *Ontario Hydro*, [1993] OLRB Rep. Jan. 46; See also *Re. Hamilton Construction Association and Builders’ Exchange and Ontario Labour Relations Board*, [1963] 2 O.R. 293 (Ont. H. Ct.) In these decisions, the Board has stressed that the “organization of employees only” theory urged upon us by the employer would be inconsistent with the broader structure of the Act, since to endow a definitional provision of the statute with the function of preserving the arm’s length relationship necessary for collective bargaining would be inconsistent with and render redundant those other provisions in the Act whose clear function is to accomplish that objective. Indeed, the Board has concluded that the very issue of “status” in the context of the statutory definition of a trade union is a misplaced one, and thus, that the composition of the membership is not a consideration entered into in determining whether an organization seeking to invoke the provisions of the Act “is” a “trade union”.

8. Perhaps the clearest and most exhaustive exposition of the Board’s reasoning in this regard is found in the “*York I*” decision, *supra*, which featured a challenge to the “status” of the OSSTF. It is to be noted that the OSSTF, by operation of statute, included (and continues to include) members who are not “employees” within the meaning of the *Labour Relations Act*. Upon its examination of the Board’s earlier treatment of the issue, and a review of the Act’s provisions relating to the operation of trade unions, the Board concluded:

55. ...

This Board does not “confer” or “grant” or, to use the language of the Board in the HEPCO case, “give” organizations “trade union status”. The only use in the Act of the term “status” in that connection is in the marginal note to section [107] of the Act. The actual language of that section, however, makes it clear that the Board only makes a finding of fact that an organization is a “trade union”, it does not give the organization some characteristic it does not already have. “Trade union” is a description, not an award. The only “status” or *in rem* quality which attaches to a determination that an organization fits the statutory definition is that the determination, once made, can be set up as *prima facie* evidence of that fact in subsequent proceedings involving employers and employees who were not parties to the proceedings in which the determination was first made. Sections 13 and [49] describe an organization which has been the object of employer participation or support as “a trade union”. If employer participation or support disqualified an organization of employees from being described as a “trade union”, as paragraph 12 of the *Children’s Aid Society* decision suggests, then the above quoted portions of sections 13 and [49] would be meaningless and unnecessary. On the language of sections 13 and [49], employer domination does not result in the withholding or removal of the “trade union” label; it results in a denial of certain rights which would be enjoyed by a trade union which was free of employer domination. A finding that an organization is a “trade union” must not, therefore, be conclusive as to the organization’s “status” to be recognized or certified as a bargaining agent under the *Labour Relations Act*. The legislature’s object was to ensure that employers and bargaining agents deal at arm’s length, and to prevent employer dominated unions from standing in the way of organizational efforts of truly employer-independent trade unions. The statutory language employed to accomplish this policy does not require us to read into [the statutory definition of “trade union”] a limitation based on the nature of duties performed for their employer by individual members of what would otherwise be a trade union.

56. The HEPCO case held that the phrase “organization of employees” must be read as “organization of employees only”, having regard to the precision with which the meaning of the word “employee” is limited by paragraph [1(3)] of the Act. That reading of the language [defining “trade union”] would exclude from trade union membership not only managerial persons, who would be considered “employees” but for the deeming provision of paragraph [1(3)], but also persons who are not in any sense of the word anyone’s “employee”. If that were the intention of the Legislature, then why it did it so carefully use the “person” in section 3 when describing those who may join and participate in trade unions? The use of that word must at very least contemplate trade unions’ having members who are not “employees” because they are unemployed: see *Ottawa General Hospital*, *supra*, at paragraphs 24 and 26. While the language of sec-

tion 3 of the Act does not create for managerial persons a protected right to join and participate in the activities of a trade union, that language is clearly inconsistent with an interpretation of [the definition of “trade union”] which requires that the phrase “organization of employees” be read as “organization of employees only”. It is noteworthy that none of the decisions which favour the “employee only” interpretation of [the definition of “trade union”] makes any reference to section 3 of the Act.

57. The HEPCO “employee only” interpretation of [the definition of “trade union”] not only fails to take the language of section 3 into account, it also comes into conflict with characteristics of organizations commonly thought of as trade unions. We have already observed that craft unions tend to have “managerial” members, and that an “employees only” definition would prevent the unemployed from joining trade unions. It must also be recognized that trade unions are often employers themselves; indeed, trade union employees can be and have been the subject of certification applications. In defining a bargaining unit of trade union employees, section 1(3) comes into play and those who act on the union’s behalf in hiring, firing and directing the work of its employed staff will be excluded as “managerial”. If [the definition of “trade union”] means what HEPCO says it does, then either those managerial persons would have to give up its employees or forfeit its “status”. This is an absurd result.

58. It is important to note also that the *Labour Relations Act* expressly defines “trade union” to include provincial, national and international trade unions. Many such organizations exist. Some existed, as OSSTF did, before the Ontario legislature enacted any collective bargaining legislation; those organizations are not disqualified as trade unions by the fact that their founders were not persons then covered by such legislation. A trade union may function in a number of jurisdictions and under a range of collective bargaining statutes. It is not disqualified as a trade union in Ontario by the fact that its members in those other jurisdictions and under those other statutes are not persons covered by the *Ontario Labour Relations Act*. It can be expected that the legislature in each such other jurisdiction will have recognized that collective bargaining requires an arms-length relationship between “employees” on the one hand and their “employer” on the other, and that in the interest of both sides it is necessary to put “managerial” employees on the employer’s side of the table in shaping any particular collective bargaining relationship. It may be supposed, therefore, that each jurisdiction and each collective bargaining statute will draw that managerial line or assign the task of line drawing to a tribunal empowered to administer the statute. While the principle of separation of employer and employee interests may be clear, the result of its application may vary from jurisdiction to jurisdiction, from statute to statute and from tribunal to tribunal. A legislature may feel that the various interests involved in collective bargaining generally, or in certain employment sectors in particular, are better served by drawing the “managerial” line at a point different from that at which this Board might have drawn the line in the same circumstances. It would seem peculiar and, frankly, pretentious if we were to deny an international, national or provincial trade union the opportunity to represent Ontario employees merely because some legislative body or administrative tribunal has required it to represent persons whom we would not, by reason of their duties, have included in a bargaining unit established under the *Labour Relations Act*. It is one thing to be ever vigilant against the mischief of company dominated unions. It is quite another to insist that those organizations which appear before this Board as trade unions conduct themselves in accordance with our views of membership purity regardless of the consequences to their ability to function in other jurisdictions. When public sector unions (OPSEU, for example) come before this Board for certification under the *Labour Relations Act*, we do not require of them proof that in their representation of employees under other statutes they have not undertaken the representation of, or accepted as members, persons whose job functions might appear to us to be “managerial”.

59. We conclude that the phrase “organization of employees” in [the Act’s definition of “trade union”] does not mean “organization of employees only”. The mere fact that an organization has in its membership persons whose employment requires them to exercise managerial functions within the meaning of section 1(3) of the Act will not stand in the way of a finding that the organization is a “trade union” within the meaning of [the definition of “trade union”] of the Act, if it otherwise qualifies to be so described. We respectfully decline to follow those earlier decisions which held otherwise. We acknowledge and share the concern those earlier decisions expressed about the “potential for conflict of interest” which can appear when managerial employees are members of trade unions. The need to keep employers and bargaining agents at

arm's length is fundamental to the scheme of the *Labour Relations Act*, but the right of employees on a majoritarian basis to freely choose their bargaining agent is equally fundamental. As a result, it is not for the Board to withhold rights from a freely selected trade union on grounds other than those contemplated by the Act. Sections 13 and [49] speak to actual employer participation and support. A speculative concern about an organization's vulnerability to employer domination no more justifies denial of representation rights than would a concern that the composition of a trade union's general membership, or of another bargaining unit it represents, might divert it from the single-minded pursuit of the interests of the employees in the particular bargaining unit it seeks to represent (see *H. Gray Limited*, ¶55 CLLC 18,011, and *Canadian Iron Foundries*, ¶56 CLLC 18,027). The *Labour Relations Act* provides safeguards against the realization of any potential for conflict of interest. By virtue of section [69] of the Act, a trade union which acquires the right to represent the employees in a bargaining unit assumes a duty to act fairly toward those employees in exercising that right, and that will require that the trade union avoid conflicts with the interests of persons excluded from that unit. While managerial membership alone will not trigger sections 13 and [49], the potential application of those sections to the trade union and, consequently, of section [65] to some one or more employers, will throw a spotlight on the reasons for such membership, and on the nature and degree of such members' participation in the affairs of the trade union. In the ordinary case, one would wonder why a person would join an organization devoted to collective bargaining in which it cannot represent him. When he is actively involved in those collective bargaining activities, one's wonder would grow at tolerance by his employer and by the trade union of any apparent conflict of interest, especially when the managerial employee had no protected right to join the trade union or participate in its activities. While it will be a question of fact in each case whether managerial members are acting on behalf of employers, there will be some cases where the absence of any explanation for the managerial employees' membership and active participation in a trade union may support an inference of employer domination. There will be few cases where, as here, the employees' allegedly managerial duties and concurrent trade union membership can be explained by the act that *both* are compelled by law. Thus, sections 13, [49] and [69] encourage trade unions to confine the influence of managerial members; section [65] provides a similar incentive to employers. These provisions, together with the bargaining unit's ultimate remedy of changing or terminating its bargaining agent, are the safeguards the legislature has decided to provide for "conflicts of interest" in a system of free collective bargaining in which the concern for viable and independent bargaining representatives must share attention with the concern for the freedom to choose bargaining representatives on a majoritarian basis.

9. We agree with the views expressed in the *York I* decision and with those cases cited above which have adopted a similar approach. We are also satisfied that this reasoning is pertinent to the circumstances of a successorship application. Contrary to employer counsel's suggestion, the Board's rejection of the "employees only" theory does not rest upon the peculiarities of the certification context. In this respect, the Board's approach to the matter cannot be characterized as a reluctance to consider the membership of non-employees in determining whether or not an organization is a "trade union" premised upon a margin of error granted to trade unions faced with uncertainty as to the employee status of persons during organizing drives. Rather, the Board's conclusion that membership by non-employees will not preclude an organization from being considered a trade union is based upon a reading of the Act as a whole, and in particular, upon careful consideration of the function of the definitional provisions of section 1(1) of the Act in establishing and preserving the arm's length relationship between management and a trade union. In short, the Board has concluded that the composition of an organization's membership, although in certain circumstances relevant to the question of whether a trade union is *dominated* by the employer (see in this respect *Hydro II*, *supra*), does not enter into the question as to whether that organization is a trade union.

10. To similar effect, we cannot accept that the fact that the constitution of the Association permits the membership of non-employees has any bearing as to whether or not the Association is or was a trade union. In this regard, counsel for the employer urged us to consider that the Association's constitution bespoke an intention to admit non-employees. Once again, that argument rests upon the premise, which we have rejected, that membership of non-employees in trade unions is a

matter of forbearance by the Board. As the *York I* case makes clear, the structure of the Act, including the very definitional language relied upon by the employer, does not merely tolerate membership by non-employees, it contemplates it. For that reason, the Board fails to understand how an organization's express intention to do what is contemplated by the Act could, in effect, disqualify it from invoking its provisions.

11. Accordingly, the Board responds to the question before us in the negative, and thus, we conclude that the fact that the constitution of the Association permits the admission of non-employees and that it in fact does so would not in itself prevent the Association from being considered a trade union within the meaning of the Act.

12. Having reviewed the voluminous materials filed by the parties with respect to the remaining issues in the present application, the Board is concerned over the expense, delay and disruption that would be entailed were the litigation of this application to proceed in its presently contemplated form. Accordingly, before the Board will resume hearings in the present application, the parties are directed to once again meet for a pre-hearing conference in order to attempt the resolution of their differences through alternate means or at the very least, to narrow the issues between them. The time and place of such conference are to be determined in consultation with the Registrar of the Board.

13. The matter is referred to the Registrar.

0062-94-R Ontario Public Service Employees Union, Applicant, v. St. Joseph's Hospital, Brantford and The Brantford General Hospital, Responding Parties

Bargaining Rights - Bargaining Unit - Sale of a Business - St. Joseph's Hospital transferring laboratory services to Brantford General Hospital - Hospitals acknowledging that transfer constituting "sale of a business" - Board finding intermingling of employees and determining that unit of all paramedical employees (and not only those employed in "stat" laboratory) constituting appropriate bargaining unit - Transferred employees representing less than 5 percent of all paramedical employees of Brantford General Hospital - Board declining to direct taking of representation vote - Board declaring that union no longer the bargaining agent for any Brantford General Hospital laboratory employees

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Mary MacKinnon*, *Ed Ogibowski*, *Barbara Marshall*, *Jill Morgan* and *Rosemary Birka* for the applicant; *Stephen F. Gleave*, *Maureen Dignan* and *Stephen C. Raymond* for St. Joseph's Hospital, Brantford; *Robert Hickman*, *Joe Buller*, and *Norm Crowe* for The Brantford General Hospital.

DECISION OF THE BOARD; August 2, 1994

1. This is an application made under section 64 of the *Labour Relations Act* alleging that a sale of a business took place on or about April 13, 1994, by the St. Joseph's Hospital, Brantford

(hereinafter also referred to as the “SJH”) to the Brantford General Hospital (hereinafter also referred to as the “BGH”), when the SJH transferred its Laboratory Services to the BGH. The applicant requests as remedies an order that the Brantford General Hospital is a successor employer to the St. Joseph’s Hospital, Brantford, and that the applicant is the exclusive bargaining agent for the following bargaining unit:

all paramedical employees of the Brantford General Hospital employed in the laboratory located on the premises of the St. Joseph’s Hospital, Brantford, save and except supervisors, persons above the rank of supervisor, professional medical staff, office and clerical staff, students employed in a co-operative training programme, students employed during the school vacation period and persons in bargaining units for which any trade union holds bargaining rights as of April 10, 1991.

In addition, the applicant is seeking a Board order that the BGH is bound by the provisions of the collective agreement which the applicant had with St. Joseph’s Hospital, Brantford, dated March 15, 1993.

2. The hospitals have agreed with OPSEU that the transfer of the laboratory services constitutes a “sale of a business” for the purposes of the *Labour Relations Act*. The questions before the Board are therefore whether there has been an intermingling of employees of the BGH and SJH; what, if any, is an appropriate bargaining unit; and, does the collective agreement continue to operate.

3. Over the course of three days of hearing, the parties called three witnesses and the St. Joseph’s Hospital, Brantford, submitted an agreed statement of facts. The facts relied upon in reaching a decision are outlined below and were largely uncontested.

THE FACTS

4. The applicant (hereinafter also referred to as the “union” or “OPSEU”), has been the certified bargaining agent for all paramedical employees of the St. Joseph’s Hospital, Brantford, since April 10, 1991. The relevant clauses of the collective agreement between OPSEU and SJH read as follows:

ARTICLE 2 - SCOPE AND RECOGNITION

2.01 The hospital recognizes the Union as the exclusive bargaining agent for all paramedical employees of St. Joseph’s Hospital, Brantford, Ontario save and except supervisors, persons above the rank of supervisor, professional medical staff, office and clerical staff, students employed in a co-operative training programme, students employed during the school vacation period and persons in bargaining units for which any trade union holds bargaining rights as of April 10, 1991.

ARTICLE 4 - DEFINITIONS

4.01 Paramedical includes occupational therapists, speech therapists, speech pathologists, physiotherapists, therapeutic and administrative dieticians, registered and non-registered laboratory technologists, registered and non-registered pathology technologists, radiological technologists (radiography), radiological technologists (nuclear medicine), registered and non-registered respiratory technologists, registered and non-registered EEG, ECG and ophthalmology technicians, registered and non-registered ultrasound technologists, glaucoma technicians, ear, nose and throat technicians, cardiovascular technicians, electro-encephalographists, electrical shock therapists, laboratory technicians, laboratory assistants, psychometrists, pharmacists, psychologists, remedial gymnasts, social workers, child care workers, nutritionists, dental health educators and bio-medical technicians, tissue processor, day hospital aide, chiroprodists, profusionists, recreational therapists, respiratory therapy aides, laboratory

aides, non-registered physiotherapy aides, occupational therapy aides, registered medical laboratory technologists, non-registered medical laboratory technologists, registered cytology technologist and others as may be added from time to time by mutual agreement of the parties.

5. The St. Joseph's Hospital, Brantford, is a 120-bed hospital providing a wide range of services to its long-term care, elderly, population and has facilities for elective surgery. Prior to the transfer of the Laboratory Department to the Brantford General Hospital, the SJH had nine departments covered by the paramedical collective agreement with OPSEU, Local 219, which included the following: Cardio Pulmonary Services, Chiropody, Food and Nutrition Services, Laboratory Radiology, Recreation Therapy, Social work/Volunteer Services, Occupational Therapy, Physiotherapy, and Speech. Between fifty-five and sixty employees were members of this bargaining unit.

6. The Laboratory Department at the SJH was comprised of testing areas for Histology, Chemistry, and Hematology, and it did specimen collection. Fourteen of the applicant's members were employed in this department in the classifications of Senior Technologist, Technologist, and Laboratory Aide. The laboratory performed both "stat" (emergency testing, where the result was required as soon as possible), and "routine" testing. Tests were requisitioned by nurses or ward clerks on the instructions of a doctor.

7. The Brantford General Hospital is a 303-bed community hospital providing a full range of primary and secondary care services, as well as some tertiary care services. It has the only Emergency Department in Brant County. The BGH and the SJH are located three kilometers apart in Brantford.

8. The BGH Laboratory Services department performs "stat" and "routine" testing. It consists of a number of sections: Chemistry, Microbiology, Hematology, Blood Bank, Anatomical Pathology, Nuclear Medicine, Respiratory, EEG, and a satellite service at the Willett Hospital in Paris, Ontario. Prior to April 1994 it employed fifty-seven employees in the Laboratory Services, not including management and clerical staff, and three Pathologists. A paramedical unit of the BGH, if inclusive of all categories of employees in the SJH paramedical bargaining unit, would consist of approximately 140 employees. The paramedical employees at the BGH are not represented by any trade union, although there was some evidence that there have been attempts to organize them, the last being in 1992.

9. Sometime prior to January 26, 1994, the Chief Executive Officers of the two responding parties asked their respective laboratory managers to work together to prepare a discussion paper regarding the cost effectiveness of the two hospitals continuing to carry on separate laboratories.

10. A discussion paper, dated January 26, 1994, was prepared jointly by Norm Crowe, for the BGH, and Rosemary Luska, for the SJH, which considered the implications of having combined, hospital-based, laboratory services with some potential for cost-savings and efficiencies, if SJH passed on all of its laboratory work to the BGH. The study was done with the proviso that although the BGH would perform all "routine" testing for SJH, it would provide a "stat" laboratory at the SJH premises. Collection services would continue to be located at the SJH with the routine samples then being sent to the BGH for testing.

11. The study assumed the "stat" laboratory would conduct only a limited number of emergency tests, based on past clinical needs at the SJH. Hence, where the SJH laboratory had been licensed by the Ministry of Health to perform 66 tests previously, the study envisaged a menu of only thirteen tests being performed should the transfer of services occur. The hours of operation

for the laboratory were to be similar to those at the time, but after-hours coverage was to be dealt with in a more cost-effective manner.

12. Since 1980 the two responding parties have co-operated in the transfer of transfusion services, cystology testing, special chemistry testing and microbiology from SJH to the BGH.

13. As a result of the Laboratory Services study, it was believed that SJH could realize an annual saving of \$406,000 if it transferred the conduct of its laboratory services to the BGH. In addition to the cost savings the hospitals would be able to have standardized diagnostic laboratory and pathology services, could implement a laboratory information system common to both hospitals, and could create a central patient laboratory data base for all of the Brant County hospitals since the BGH was already providing the laboratory services at the Willett Hospital in Paris.

14. Following discussions between the hospitals, on April 5, 1994, SJH transferred its Laboratory Services to the BGH on the following terms:

(i) St. Joseph's Hospital agreed to pay Brantford General \$620,000 per year for providing Lab Services (based on St. Joseph's Hospital supplying 877,950 units per year);

(ii) Brantford General Hospital agreed to maintain a "stat" lab on St. Joseph's Hospital premises. This lab would be less than one-third the size of the original St. Joseph's Hospital lab. The hours of operation of the "stat" lab would be 0700 - 2300 Monday to Friday, and 0700 - 1500 on Saturdays, Sundays and Statutory Holidays. Outside these hours, "stat" testing would be conducted at Brantford General Hospital;

(iii) Brantford General Hospital would collect "routine" testing for St. Joseph's Hospital from 0800 - 1600 Monday to Friday (statutory holidays not included).

15. While there had been fourteen full and part-time employees who were OPSEU members working for the SJH Laboratory Department prior to April 5, 1994, following the transfer only five full and part-time people remained working in the "stat" laboratory at SJH, and two part-time employees transferred to the BGH main laboratory. The remaining laboratory employees were laid off from SJH, except for one employee who was receiving long-term disability benefits. The applicant is not seeking representation rights for the two employees transferred to the BGH laboratory.

16. The BGH stressed in its evidence the high level of integration of the previous SJH laboratory services into the BGH laboratory services. A new supervisor at the BGH (who used to be the laboratory manager at St. Joseph's Hospital) is to be responsible for the day to day operation of the "stat" laboratory and the collection services at the SJH, and the collection services at the Willett Hospital; she will also be responsible for supervision of the phlebotomists at the BGH laboratory, in-patient and out-patient collections, and a new centralized specimen-collection handling system at the BGH.

17. As a result of the transfer agreement the "stat" laboratory and the collection centre at the SJH will be one third the size of the original SJH laboratory services and almost all routine testing will be conducted at BGH premises. SJH had a Ministry of Health license to perform sixty-six tests at its laboratory. As a result of the transfer SJH has requested that the license be amended to allow only thirteen "stat" tests to be performed at the "stat" laboratory at SJH, and that the

license indicate that the BGH will be performing those thirteen tests. Between 0700 and 2300 hours, Monday to Friday, and 0700 and 1500 hours on Saturdays, Sundays, and statutory holidays, all "stat" testing will be done at the SJH laboratory. Any "stat" tests needed outside those hours are sent by taxi to the BGH main laboratory where the testing is performed on an emergency basis. All of the emergency testing at SJH amounts to 5 per cent of the total laboratory testing work which has been transferred to the BGH.

18. Some changes were made at the BGH to accommodate the increase in the routine testing to be conducted there as a result of the transfer. Two part-time employees were added, from among the previous SJH staff complement; part-time staff at the BGH were given more hours, and a central specimen handling system was put in place. The BGH now holds the service contracts for the equipment used at the SJH "stat" laboratory, it moved some testing equipment to the main laboratory, and it installed a new piece of equipment to improve urinalysis testing at the SJH. To reduce the number of "stat" requests for glucose tests at the SJH, the BGH introduced new glucometers for bedside testing by nurses and trained the nurses on the use of the new meters. The BGH has installed computers at the "stat" laboratory to track specimens and to link its laboratory information system to the "stat" laboratory in an effort to streamline paperwork and to provide a central data base. There was some evidence of plans for the future for equipment, staffing, and hours of operation of the "stat" laboratory; however, for the purposes of this decision, it is unnecessary to outline that evidence.

19. The Brantford General Hospital had indicated to the staff of the SJH laboratory in January 1994 its plans to rotate Registered Technologists through the "stat" laboratory and the main laboratory to maintain the competence of the technologists. The rotation was to begin approximately eight to ten weeks after the transfer of services to ensure a smooth transition at the outset. At the time of the hearing the transfer had occurred about four weeks previously and no rotation was operational. Since the "stat" laboratory employees would only be conducting 13 tests, and there would be a limited volume of tests, it is believed they will have exposure to limited, basic testing, without the benefit of seeing abnormal or interesting patient cases. At the main laboratory Registered Technologists are exposed to a large volume of samples, a larger complement of laboratory testing, more sophisticated equipment, and there is therefore a greater opportunity for continuing education and to maintain competency. At present, whenever there are absences due to vacation, sick days, or social contract days, BGH staff fill in at the "stat" laboratory. All "stat" laboratory employees at the SJH have been given an orientation to the BGH main laboratory and are getting a two day orientation to the whole Brantford General Hospital. They will also receive two to three days of computer training. The "stat" laboratory employees are expected to attend eight staff meetings per year at the main laboratory and to attend the in-house continuing education program run by the pathologists at the main laboratory. BGH staff have worked in the "stat" laboratory setting up equipment, moving some equipment out, and assisting in the clean-up of the laboratory. Supervisors from the main laboratory have been to the "stat" laboratory frequently to standardize any tests which had not already been standardized, to ensure accuracy of the tests, and to check equipment, as the BGH is now responsible for all of the testing and maintenance of equipment at the "stat" laboratory. There is day to day communication between the SJH "stat" laboratory staff and the BGH main laboratory staff. A pathologist at the main laboratory may ask a technologist at the "stat" laboratory to conduct a specific test as required.

ARGUMENTS

20. OPSEU argued that since the "stat" laboratory has remained operational at SJH with former SJH bargaining unit employees doing the same work as they did previously, and since there has been no intermingling, section 64(6) of the Act should not be considered. The applicant is

seeking a bargaining unit composed of the “stat” laboratory employees at the SJH location only. In the event that the Board finds there has been intermingling, the applicant suggests that all of the laboratory employees of the BGH would comprise an appropriate bargaining unit and that the Board should order a vote to be held among all of the laboratory employees of the BGH.

21. The BGH argued that the BGH has taken over the SJH laboratory services in their entirety, that the nature of the business has been changed substantially, that staff have been intermingled, and that the operations are now completely integrated, so that section 64(6) does become operational. The BGH argued further that the Board should not find a five-person bargaining unit made up of the “stat” laboratory alone as a viable unit given the level of integration of the operations of the laboratories. It also argued that since the percentage of SJH employees who had come into the BGH laboratory was miniscule in comparison to the number of BGH laboratory employees or to the paramedical employees at the BGH, the Board should decide the matter without directing a vote.

22. The SJH also argued that there had been an intermingling of operations and employees, that section 64(6) should therefore apply, and that the Board should not find the bargaining unit proposed by the applicant to be an appropriate bargaining unit.

23. The concern of the BGH is that if the “stat” laboratory becomes a separate bargaining unit the skill levels of the technologists will decrease quickly because they will not be exposed to the full range of testing they have heretofore been exposed to, they will be isolated from the staff at the BGH main laboratory, and their ability to transfer to positions in the main laboratory would be compromised because they would not possess the same skills as the technologists at the main laboratory. In addition, since the technologists at the “stat” laboratory would have limited exposure to abnormal tests, an abnormality in a patient’s test may slip by them, thereby compromising patient care. The staff at the collection centre at the Willett Hospital, in Paris, Ontario, have been rotating through the main BGH laboratory for some time and the BGH had envisaged the same routine for the SJH “stat” laboratory staff.

24. The union’s concerns about the loss of bargaining rights for the “stat” laboratory employees are that some employees would be paid less than they were receiving as employees of SJH and will receive lower benefits, employees will not have seniority rights at the BGH, and they may be laid off without any bumping rights since the BGH does not layoff in order of seniority. As well, since attempts to organize the BGH laboratory employees had failed in the 1980’s and again in 1992, the union believed the “stat” laboratory employees would not have any access to collective bargaining in the future and so the union was seeking to preserve their present bargaining rights.

DECISION

25. The following sections of the Act are relevant to this proceeding:

64.(1) In this section,

“business” includes one or more parts of a business; (“entreprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

• • •

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

(4) An interested person, trade union or council of trade unions may apply to the Board to determine,

- (a) a question concerning the scope of bargaining rights of the trade union referred to in subsection (3); or
- (b) a conflict in the bargaining rights of the trade union referred to in subsection (3) and another trade union representing employees of the successor employer.

(4.1) On an application under clause (4)(a), the Board may alter the composition of the bargaining unit for which the trade union referred to in subsection (3) holds bargaining rights.

(4.2) On an application under clause (4)(b), the Board may alter the description of a bargaining unit in a certificate issued to any trade union or the definition of a bargaining unit in a collective agreement.

(5) An interested person, trade union or council of trade unions may apply to the Board within sixty days after the predecessor employer sells the business for the termination of the bargaining rights of the trade union referred to in subsection (3).

(5.1) On an application under subsection (5), the Board may terminate the bargaining rights of the trade union only if it considers that the successor employer has changed the character of the business so that it is substantially different from the business of the predecessor employer.

(6) This subsection applies if the successor employer carries on one or more other businesses and the successor employer intermingles the employees of the business sold to him, her or it with those of another business. On application, the Board may,

- (a) declare that the successor employer is no longer bound by the collective agreement to which the predecessor employer was bound;
- (b) determine the unit or units of employees that are appropriate for collective bargaining;
- (c) declare which trade union or council of trade unions, if any, becomes the bargaining agent for the employees in each of the bargaining units;
- (d) amend, to the extent the Board considers necessary, any certificate issued to a trade union or council of trade unions or any bargaining unit defined in any collective agreement; and
- (e) define or redefine the seniority rights under any collective agreement of the employees concerned.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under clause (6)(c) and it is not already bound by a collective agreement with the successor employer

with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and the notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) A declaration under subsection (6) has the same effect as a certification under section 9.1, for the purposes of sections 5 (application for certification), 58 (application for termination), 60 (termination of bargaining rights), 62 (application for certification or termination) and 125 (application for termination).

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(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

26. As outlined earlier, the responding parties have agreed that for the purposes of the *Labour Relations Act* the transfer of the laboratory services from the St. Joseph's Hospital, Brantford, to the Brantford General Hospital constitutes the "sale of a business" within the meaning of section 64. Pursuant to section 64, the Board therefore declares that there has been a sale of the laboratory from the SJH to the BGH on April 5, 1994.

27. Section 64(2) deals with the consequences of a sale of a business and preserves the trade union's rights with respect to transferred employees until such time as the Board determines otherwise. In this case, the Brantford General Hospital has been in compliance with the Act and all former SJH bargaining unit employees who are now employed by the BGH have been receiving the wages and benefits which flow from the collective agreement between the St. Joseph's Hospital, Brantford, and OPSEU.

28. Brantford General Hospital argued that following the transfer there was a substantial change in the business and that section 64(5.1) should therefore be applied by the Board. The onus is on this responding party to demonstrate that the nature of its business is substantially different than the SJH laboratory services, the predecessor employer.

29. In *Winco Steak n' Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788, the Board considered whether following the sale of a business the new owner had so changed the character of the business so that it was substantially different from the business of the predecessor employer. The new owner had changed the restaurant menu, the appearance and atmosphere of the premises, and was providing alcoholic beverages. The Board in that case stated the following:

... the Board takes the view that the words "substantially different" must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued

representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review.

30. From the evidence led, it would appear that the work being performed by the BGH after the transfer is substantially the same as the work that was being performed at the SJH prior to the transfer. Both “stat” and “routine” testing is still being done, indeed, the very reason for the transfer was that the BGH could apparently do the same work more efficiently and at less cost than could the SJH. To the extent that there has been any change, it is that the location of the testing has changed so that only “stat” testing and specimen collection continues to be provided at the St. Joseph’s site. The routine testing is now being conducted three kilometers away at the BGH laboratory where both “stat” and routine testing has been carried out for some time. Registered Technologists, some of whom are the same employees who did the testing prior to the transfer, are still performing the tests. Some of the equipment used is the same, and at the “stat” laboratory, the same Ministry of Health licence is still operational.

31. Further, there is nothing in the evidence to suggest there is a fundamental difference between the skills required or the work which is being done by the employees now and what they were doing prior to the transfer. There is therefore no substantial change in the nature of the business which has been transferred, and the Board declines to terminate the applicant’s bargaining rights on the basis of section 64(5.1).

32. Both of the hospitals argued that there has been an intermingling of services of the two hospitals and of the unorganized employees of the BGH with the bargaining unit members of OPSEU from the original SJH unit, and that section 64(6) of the Act should therefore be applied, that the Board should declare that the BGH is no longer bound by the collective agreement, and that the bargaining unit the applicant is seeking is not an appropriate bargaining unit.

33. The applicant argued that it would be premature for the Board to find that there had been intermingling of the employees of the SJH laboratory services with the employees of the BGH and referred the Board to the *City of Peterborough*, [1979] OLRB Rep. Feb. 133 decision. In that case there was a transfer of a municipal bus service from a franchise operator back to the City of Peterborough, and in anticipation of the transfer, and preceding the transfer, there were inspections done of equipment by City employees who belonged to a different union than the one representing the employees of the bus company. By the time of that hearing there had been no merger of the bus service employees with the City employees, each group continued to work at separate jobs, with separate equipment, and out of separate locations, just as they had prior to the sale. The Board found there had been no intermingling of employees that would trigger what is now section 64(6) of the Act.

34. The evidence in this case is different than that found in the *City of Peterborough, supra*. In the case before us there appears not to have been any *regular* interchange of employees between the “stat” laboratory and the main laboratory yet, although it is anticipated. However, there have already been occasions when main laboratory technologists have filled in for absent technologists at the “stat” laboratory, for vacations, sick days, social contract days, and while one union witness was at the Board giving evidence in this case. Main laboratory technologists worked at the “stat” laboratory at SJH to move equipment, set up equipment, and to clean out the old laboratory. Supervisors from the main laboratory have been at the “stat” laboratory to calibrate and check equipment in preparation for standardized testing. “Stat” laboratory employees have been to the main laboratory for some days of orientation to the equipment at the main laboratory and to the Brantford General Hospital itself. These employees will be receiving training on the BGH computer system so that they will be able to use the centralized patient information system utilized by the BGH laboratory. In addition to the examples of intermingling outlined above, there were also

two part-time SJH employees who have already gone over to the main laboratory and have begun to work there. The transfer was only four weeks old at the time of the hearing and already there were a number of examples demonstrating the integration of employees of the two operations outlined above.

35. In *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. August 1060, the Board considered what section 64(6) [then 63(6)] was meant to address and stated as follows:

32. ... It is true that the subsection speaks of the purchaser intermingling the employees of one business with those of another. But that appears to be simply a more precise way of referring to the intermingling of the businesses themselves: it is in fact the "employees" of the businesses who are capable of being "intermingled". The focus of section [64] is on the business, and it is the practical problem of running two integrated businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one "non-union", which would appear to have prompted the Legislature to provide the relief contemplated by subsection 6. ...

Reflecting the Board's view in *Caressant Care* in *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130, in a situation similar to the one in this case, the parties agreed there had been "intermingling" within the meaning of section 64(6) even though there had been *no* intermingling of employees.

36. In the case before us, the responding parties specifically contemplated the take-over of the SJH laboratory services by the BGH laboratory services and agreed that the BGH would staff a "stat" laboratory and perform collection services at the SJH premises. After the "stat" laboratory hours however the "stat" work has to go to the BGH laboratory. Collection services are necessary at the SJH because test samples have to be collected to be transported to the BGH laboratory. The "stat" laboratory at the SJH is not a stand-alone operation, but is a satellite location of the BGH laboratory services designed to meet a customer need, now that the SJH is the customer. As the evidence disclosed, it is an integrated part of the BGH operation which cannot provide services on its own without the Brantford General Hospital superstructure.

37. For all of the above reasons, the Board finds that there has been an intermingling of the employees of the former SJH laboratory with the BGH laboratory services, as contemplated by section 64(6) of the Act, and there has been an integration of the two services into one Brant County hospital laboratory service.

38. Having found that there has been intermingling of the employees and services of the SJH and the BGH employees, we must now determine what, if any, is an appropriate bargaining unit, and whether or not the BGH is bound by the OPSEU collective agreement.

39. The applicant has asked that the Board preserve the bargaining rights of the "stat" laboratory employees *located at SJH only* as they were already represented by a trade union and may not have an opportunity to be so represented again if a "stat" laboratory bargaining unit is not granted by the Board. They do not seek any representation rights for employees working in the laboratory located at BGH, even though they may be doing "stat" testing.

40. In all of the cases the Board was referred to by the applicant the successor employer took over the complete operation in question so that the whole original bargaining unit was transferred. Where there had been little or no intermingling of employees, the Board did find that the original bargaining unit was an appropriate one and preserved the bargaining rights of the employees and their trade union. See *The Oshawa Wholesale Limited*, [1965] OLRB Rep. Feb. 584; *City of Peterborough*, [1979] OLRB Rep. Feb. 133. In *Oshawa Wholesale* the Board held that the trade

union should continue to hold bargaining rights in a *like* bargaining unit, and that therefore in deciding these types of cases the Board should not only consider what would be an appropriate bargaining unit, as it does in certification applications, but also must take into account the scope of the bargaining unit already in existence. These cases referred to by the applicant were all adjudicated when what was then section 63(4) required the Board to consider “the like bargaining unit”. Amendments to the Act have removed any references to “the like bargaining unit” and the Board is now mandated to determine the unit which is “appropriate for collective bargaining” (64(6)(b)).

41. In *The Municipality of Metropolitan Toronto*, [1992] OLRB Rep. March 315, the Board considered a situation where there had been the intermingling of two organized groups of employees when the Municipality purchased a nursing home. The Board recognized that if there has been an intermingling of employees the new labour relations realities of that situation may make ineffective or undesirable any attempt to maintain boundaries which had previously been established since there may have been a concurrent intermingling of the work or job opportunities themselves. In that case, the Board noted that the predecessor business had been completely absorbed and adapted into the successor business, workers of both were working side by side, and they were doing similar work. The Board declined to award the applicant in that case a separate bargaining unit for the employees of the predecessor employer.

42. In this case there is no doubt that a coherent and severable portion of the St. Joseph’s Hospital services was transferred to the Brantford General Hospital and that the BGH has continued to provide the same type of services as the SJH was providing. However, OPSEU is not seeking a preservation of a bargaining unit like the one it had at the St. Joseph’s Hospital, it is seeking a unit made up of only the “stat” laboratory employees at the SJH location. In the alternative, OPSEU is seeking a unit comprised of all of the laboratory services at the BGH. The bargaining unit at SJH was an “all paramedical employees” unit and included in that grouping the laboratory services employees, from “stat” and “routine” testing. The applicant is therefore seeking a bargaining unit which is a fragment of the one it had at SJH.

43. The applicant requested that the Board consider the union’s ability to organize the laboratory services employees at the BGH. As outlined earlier, there have been attempts to organize these employees, as recently as in 1992, and there has been no success. We agree with the sentiments expressed by the Board in *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, that there must be a balancing of the statutory objectives in the circumstances of each case. The Board there stated:

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade union’ to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. ...

44. In *Kitchener-Waterloo Hospital*, *supra*, the Ontario Nurses Association (ONA) was seeking a bargaining unit comprised only of all nurses working in the Obstetrics and Paediatrics Departments, and not an “all nurses” bargaining unit, in circumstances not dissimilar to those in the case before this panel. At St. Mary’s Hospital (the predecessor employer) ONA had represented an “all nurses” unit. At Kitchener-Waterloo Hospital the nurses were treated by the employer as one group for labour relations purposes. The Board concluded that “all nurses” units were appropriate in that case and stated as follows:

47. In balancing these considerations, we nevertheless cannot accept the unit sought by O.N.A.

We do not consider a bargaining unit consisting of only two departments in a multi-department, multi-service hospital to be appropriate. In our view it would lead to undue fragmentation, and would likely result in serious labour relations problems for all parties. Bargaining units in hospitals are generally defined in terms of "all nurses", or "all employees employed in a nursing capacity", without differentiation based solely upon the department or departments in which particular nurses work at a given point in time. In hospital settings throughout the province, as reflected at St. Mary's where O.N.A. represents the nurses, the employers and the union have generally not delineated units on a departmental basis, for to do so is neither consistent with the administrative operation of hospitals nor to the benefit of the nurses represented by a trade union. Such fragmentation may well impede a nurse's ability to move to other departments within a hospital. It may also seriously impede the efficient running of the hospital.

45. On the facts before us, it would appear that the applicant is seeking a bargaining unit of one small part of a laboratory service, or alternatively, the whole of the laboratory service, but to the exclusion of the rest of the BGH paramedical staff. While the SJH laboratory employees have an interest in being represented by a trade union, the rest of the BGH laboratory staff appear not to have expressed any desire to be represented by a trade union, and the evidence discloses an integrated laboratory service in which the "stat" laboratory is but a small part. As outlined earlier, the "stat" laboratory is not an atomized portion of the laboratory service: it has common supervision with other portions of the BGH laboratory; employees and supervisors from the main laboratory have worked at the "stat" laboratory; after-hours services are provided at the main laboratory; "stat" laboratory employees have been to the main laboratory for training on the equipment there and the plan from the beginning was to rotate employees through the two laboratories; and, two employees from the SJH laboratory have transferred to the main laboratory. While there is no presumption in favour of the most comprehensive bargaining unit, to put up a figurative wall between the small SJH "stat" laboratory and the rest of the BGH laboratory services would not create a viable and stable unit for the purposes of collective bargaining, would cause excessive fragmentation in a relatively small laboratory operation, and would create considerable labour relations problems for the BGH. In the circumstances of this case the Board does not find a bargaining unit comprised of the "stat" laboratory at the SJH to be an appropriate bargaining unit.

46. We turn now to a consideration of the appropriateness of a bargaining unit comprised of all the laboratory services of the Brantford General Hospital at both locations. The Board has found on numerous occasions that a bargaining unit made up of *all* paramedical employees is an appropriate bargaining unit at a hospital as such a configuration avoids undue fragmentation and the possibility of there being a number of collective agreements for like employees in one workplace. For reasons similar to those outlined in the paragraph above, and in *Kitchener-Waterloo Hospital, supra*, we do not consider a bargaining unit consisting of one department of a multi-department hospital to be an appropriate unit for collective bargaining purposes. We therefore conclude that the appropriate bargaining unit would be described as including all paramedical employees of the Brantford General Hospital, with the usual exceptions.

47. Pursuant to section 64(8) of the Act the Board may order that a representation vote be held if it considers it appropriate in the circumstances. A vote would determine if the paramedical employees of the BGH wish to be represented by the applicant. In cases of intermingling the Board considers the relative percentages of the unionized and non-unionized employees in deciding whether a representation vote should be held (see *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166; *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526; and *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130). Where there is a large disparity between the two groups and the unionized employees are in a significant minority, the Board may exercise its discretion to decide the matter without a vote being held. In *Kitchener-Waterloo Hospital* no vote was ordered since approximately 9% of the employees of the bargaining unit were then part of the larger non-union successor employer nursing unit. In *Mountain View Dairy Limited*, [1967] OLRB Rep. Feb.

911 the Board declined to direct that a representation vote be held when the unionized employees represented only 13% of the total intermingled group.

48. As outlined earlier, a total of seven full and part-time SJH bargaining unit employees have been transferred to the BGH laboratory operation. Prior to the transfer, there were 140 BGH employees who could have been considered appropriate for inclusion in a paramedical unit of the type present at the SJH, of which the SJH laboratory employees were a part. The SJH employees who have become BGH employees therefore represent approximately 4.76% of all paramedical employees of the BGH. The Board therefore exercises its discretion to decline to direct that a vote be held in this case as the vast majority of the employees in the voting constituency would be non-union employees who have not expressed any interest in being represented by the applicant.

49. We declare that OPSEU is no longer the bargaining agent for any of the Brantford General Hospital laboratory employees and that the applicable collective agreement is no longer binding upon the Brantford General Hospital.

50. The final issue to be determined, having regard to section 64(6)(a), is when OPSEU's bargaining rights should be considered to have terminated. The responding parties have argued that the operative date should be the date of the sale, April 5, 1994. The applicant took no position.

51. In *Kitchener-Waterloo Hospital*, [1993] OLRB Rep. March 187, the Board addressed this issue in the context of a sale of a part of a business from the St. Mary's Hospital to the Kitchener-Waterloo Hospital. The Board determined that it had "the jurisdiction to make its declarations terminating bargaining rights and declaring that a collective agreement no longer applies effective at a time earlier than the date of the issuing the declarations". We concur with the following statement of the Board in that case:

14. The purpose of section 64 is to ensure that bargaining rights and collective agreement obligations carry forward with no interruption through legal transactions and legal litigation. The purpose is to ensure that rights that ought to be preserved do not lapse in the "in-between" times. But where, for sound labour relations reasons, the Board concludes that those rights ought to be terminated, the statutory scheme does not demand that the terminated rights continue until the date of the Board's decision. To read section 64(6) in this manner would undercut the purpose of section 64. It would serve to extend bargaining rights until applications could be disposed of, rather than severing them at the time the Board, as directed by the legislation, determines it is appropriate to do so. It would also interpret section 64(6) in a manner that could lead to absurd results.

52. The BGH has been complying with the terms of the OPSEU collective agreement, and while the BGH is seeking termination of OPSEU's bargaining rights as of April 5, 1994, it is not seeking any other remedy flowing from such a declaration. Since the applicant took no position with respect to the effective date of the declarations, and since there appears to be no practical effect of making the declarations effective on April 5, 1994, the Board finds it appropriate that the declarations outlined above should be effective as of the date of sale, April 5, 1994.

1565-94-M Service Employees Union Local 268, affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C., Applicant v. **The Brick Warehouse Corporation**, Responding Party

Change in Working Conditions - Interim Relief - Remedies - Unfair Labour Practice - Union alleging that change in benefit plan and change in method of wage payment to particular classification improperly motivated and violating statutory freeze - Union's application for interim relief dismissed on grounds of delay

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Glen Oram* for the applicant; *Michael G. Sherrard* and *Kevin Fahey* for the responding party.

DECISION OF THE BOARD; August 18, 1994

1. This is an application under section 92.1 of the *Labour Relations Act* (the "Act") seeking interim relief. By decision dated August 8, 1994, that application was denied. I now provide brief reasons for that determination.

2. The responding party (the "employer" or the "company") operates retail furniture outlets. It has some forty-two stores across Canada. Three stores in Ontario are represented by the Retail, Wholesale, and Department Store Workers' Union. The applicant (the "trade union") was certified to represent the approximately twenty employees in the bargaining unit in the Thunder Bay store in September, 1993. Notice to bargain was forwarded to the employer in September. At the time this application was filed on July 29, 1994, the parties were continuing in their attempts to negotiate a first collective agreement. On that same day a section 91 compliant was filed with respect to the same matters.

3. By way of interim relief the trade union sought an order that the employer reinstate the employee benefit plan on the same terms and conditions that existed on the date that the union gave notice to bargain, until such time as the Board disposes of the main complaint under section 91. That complaint alleges that the responding party, in addition to acting in a manner that was improperly motivated, has violated the "freeze" provisions of the Act. Secondly, the trade union sought an order that the employer reinstate a method of payment of wages to the "swamper" classification and an order to compensate for any loss arising as a result of the employer's action with respect to that and certain other classifications.

4. I note that the trade union sought further relief in its interim application. That relief was in the nature of information and/or production of documents. That information is arguably relevant either in the parties' negotiations or for the efficient hearing of the main application. Counsel for the employer undertook to seek instructions in order to provide that information where possible. Some of the information had been provided to the applicant in anticipation of this matter.

5. In support of its application the trade union filed three declarations and a number of documents and correspondence. Similarly, the responding party filed four declarations and some records and correspondence. I heard the parties' representations based on that material. There was no real dispute as to the test to be applied in determining the application. That test was formulated in *Loeb Highland*, [1993] OLRB Rep. Mar. 197 and has been applied in various cases since then. It contemplates a two-fold analysis; first, assuming the applicant's assertions to be true and provable,

is there an arguable violation of the *Labour Relations Act*. Second, if so, does the balance of harm favour the granting of interim relief.

6. The first aspect of the union's application was with respect to an alleged change in wage rate for the "swamper" classification at the store. It is asserted by the union in the main application that the employer changed the wage rates to the benefit of the employees in November 1993, and that the union consented to that change. The union further asserted that at some point in December 1993 the employer reverted to paying the earlier rates. There was further discussion in April, 1994 concerning other changes to wage rates for truck drivers and delivery staff.

7. The second aspect to the union's application sought the reinstatement of the employee benefit package in place as of September 1993. On March 31, 1994, the employer gave notice to its employees across Canada that it intended to implement changes to the benefit package effective June 1, 1994. That notice was provided to the employees in the Thunder Bay store although not directly to the trade union. (I note that counsel for the employer has undertaken to instruct his client to provide notice to the union directly of any such changes in these and future negotiations). In early April 1994 at the latest, the union learned of the proposed changes. On April 19, 1994 the union wrote to counsel for the employer indicating that the union did not consent to any alteration of the benefit package and requesting that the employer cease and desist from implementing any changes. There was some limited discussion of the changes during negotiations in late April 1994. The employer indicated that it would attempt to provide more information to the union with respect to the changes. On May 25, 1994 a letter from the union was forwarded to counsel for the employer indicating that further information had not been received as requested, and if not received soon, the union would be forced to file a complaint with the Board. The changes contemplated by the employer took effect on a national basis on June 1, 1994. On July 4, 1994 the employer informed the union that no other information was available. The union filed its request for interim relief and its main complaint on July 29, 1994. The union did not and has not requested that the main application be heard on an expedited basis.

8. Dealing with the first element of the test, I was satisfied that the applicant had made out an arguable case of a violation of the Act. In both aspects of the employer's conduct complained of, the employer allegedly implemented changes to terms and conditions of employment without the consent of the trade union. That is the essence of a violation of section 81 of the Act. Similarly, if it is found that the changes were driven, even in part, by an improper motive as alleged by the applicant, a violation of one or more of sections 67, 67 and 71 would be made out.

9. However, in dealing with the issue of assessing and balancing the harm, I was concerned about the union's delay in bringing its application for interim relief. With respect to the first aspect of the union's application, it is clear that whatever concerns the union may have had with respect to changes in wage rates either allegedly consented to or objected to, those concerns crystallized by April, 1994. This application was not filed until July 29, 1994. That length of delay in bringing an interim application is simply too long. It reflects a lack of urgency and lack of need for an interim remedy.

10. With respect to the second aspect of the application, I agreed with the applicant that a party to negotiations ought not to seek assistance from the Board too quickly where matters of concern are also being dealt with in negotiations. However, in this case, I was persuaded that the delay in filing the request for interim relief was such that it would be inappropriate to grant the interim relief. The union was aware at least as of early April 1994 that the employer intended to effect the changes to the employee benefit plan on a national basis on June 1, 1994. There was no

indication from the employer that it intended to delay or defer that date even after having been advised by the union that it did not consent to those changes.

11. Had the union filed its interim application more expeditiously, there is every likelihood that a decision, at least on an interim basis, could have been provided to the parties prior to June 1, 1994, and prior to any change having taken effect. Similarly, given the time span between learning of the proposed change and the effective date of those changes, had the main application been filed with a request to expedite that hearing, there might well have been an opportunity to have had the merits of the complaint determined prior to June 1, 1994.

12. Moreover, there is no real explanation as to why the union delayed between the implementation of the changes effective June 1, 1994 and the actual filing of the complaint some eight weeks later on July 29, 1994. The union argued that the employer ought not to be able to benefit from its delay in responding to the union's request for information. Further, the fact that the parties were involved in negotiations on these very issues during this period ought to be taken into account. There is little doubt that changing the benefit plan may alter the balance of the negotiations, and in that sense the employer's conduct may well reflect various underlying strategies or tactics in the negotiations even if found to be within its legal rights.

13. In that regard I agree with the comments of the Board in *Beef Improvement Ontario Incorporated*, [1994] OLRB April 341. I would not encourage parties in negotiations to seek the assistance of the Board on an interim basis at every turn, preferring as a general rule that they resolve those differences during the course of their negotiations. However where those negotiations are delayed or are not proceeding as quickly or as productively as one party might hope, and issues arise, it may be necessary to utilize other remedial avenues such as a request for interim relief, and to do so within an appropriate time frame. That time frame, of course, will depend on the circumstances of each case. In this case, in addition to the passage of time prior to bringing the interim application (both before and after the effective date of the change), the applicant has not sought an expeditious determination of the merits of the complaint to clarify the employer's obligations during the negotiations. The applicant thereby has indicated a willingness to rely on the negotiating process to resolve these matters, even while it advised the employer of the possibility of its proceeding before the Board.

14. I note that had the applicant's conduct indicated greater urgency and therefore greater concern over the potential collective bargaining harm to it, one harm asserted by the employer, that is, the cost of implementing a "stand-alone" benefit plan for the affected employees, might well have been seen as "self-inflicted" harm at best, and insufficient to outweigh the collective bargaining harm from failing to preserve a status quo on an interim basis.

15. I note as well that it may be appropriate for the Board, on an interim basis, to maintain an existing status quo pending a determination of an allegation of a violation of the freeze, simply to maintain whatever balance exists in the bargaining, regardless of an employer's assertion that it is not in violation of the freeze. That section already creates a form of interim remedy - essentially that a particular state of affairs be maintained during bargaining. Where the description of that state is put in question, not allowing *any* change from that which existed as of the notice to bargain seems the appropriate interim remedy if interim relief is otherwise appropriate. That merely reinforces the primary purpose of a "freeze" and has the minimum impact on the parties' relative bargaining positions in the negotiations. It also reinforces the legislative requirement that an employer seek and obtain the consent of the union prior to implementing changes.

16. For those reasons, the application for interim relief was denied.

3768-93-M The Great Atlantic & Pacific Company of Canada, Limited, Applicant v. United Food & Commercial Workers International Union, Locals 175 and 633 and Shelly Fair Service, Scott Constable, Peggy Swift and Gary Dimock, Responding Parties

Interim Relief - Picketing - Remedies - Employer making application under section 11.1 of the Act for restrictions with respect to picketing - Employer seeking interim order restricting the picketing pending determination of its section 11.1 application - Balance of harm weighing against making interim order sought - Application for interim relief dismissed

BEFORE: *Judith McCormack*, Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

APPEARANCES: *C. R. Robertson* for the applicant; *Cynthia D. Watson* and *Michael Klug* for the responding parties.

DECISION OF JUDITH McCORMACK, CHAIR, AND BOARD MEMBER

P. V. GRASSO; August 2, 1994

1. This is an application for interim relief under section 92.1 of the *Labour Relations Act*. On February 7, 1994 the Board delivered the following oral decision:

A majority of the Board, Board member Shamanski dissenting, is of the view that the interim order sought is not appropriate in the specific circumstances of this case. Our respective reasons will follow shortly.

We now provide our reasons.

2. The interim relief application before us relates to an application under section 11.1 for restrictions with respect to picketing. That main application concerns picketing occurring in connection with a lawful strike of sixty-three Miracle Food Mart stores owned by the applicant. More specifically, it is addressed to picketing taking place at Store 109 in the Oshawa area. Employees at Store 109, which operates under the name of A & P rather than Miracle Food Mart, are not on strike. However, it was not suggested that this fact affected the rights of the picketers since it is owned by the applicant.

3. The strike in question began on November 18th, 1993 and the picketing at Store 109 has been in progress since the beginning of December. On December 20th, the applicant brought a motion for an injunction in the Ontario Court of Justice (General Division) to restrain picketing on the perimeter of the property. There is no dispute that this motion addressed only property which is beyond the jurisdiction of the Board. The parties negotiated a settlement of the motion which was incorporated into a consent order dated December 20, 1993. The effect of that order was to permit trucks to enter and leave the property of the shopping mall in which Store 109 is located, albeit with certain conditions.

4. However, the order did not address what would happen after the trucks came on to the property. With the assistance of police at the scene, the parties arrived at an arrangement where products were unloaded at the southwest corner of the property and then transferred to the store itself by handcart or dolly. There is some dispute with respect to the nature of this arrangement and how it came into being. Nevertheless, it is common ground that the arrangement continued

until January 25, 1994. No action was taken by the company in regard to Store 109 during this five-week period, although there was litigation proceeding with respect to other stores.

5. On January 24th, 1994 the Ontario Court of Justice issued a decision with respect to another store, Store 808, in which it upheld an earlier decision to the effect that the Board had exclusive jurisdiction in that case. The Court also saw fit to make some comments in obiter, which apparently prompted the company to unilaterally withdraw from the arrangement mediated earlier by the police at Store 109. As a result, on January 25th the company decided to deliver some soft drinks to Store 109 by having a truck approach the loading docks, rather than the southwest corner. This attempt was supervised and filmed for the company, which asserts that picketers blocked the truck's access to the loading docks. The company also makes some broad assertions with respect to harassment, damage and obstruction which it claims has been ongoing since shortly after November 18, 1993. No details in regard to any specific incident are provided, except for the one on January 25th above. These broad assertions and much of the harm the company alleges has resulted are not pleaded in the main application to which this case relates.

6. The gist of the company's position was that the picketing activity at Store 109 was unlawful in the sense that it was a breach of the common law, and that the Board should not allow it to continue for another hour, let alone several days pending the completion of the main application. Although there was no dispute that trucks were still coming onto the property and that products were being unloaded and taken into the store, the applicant was of the view that the trucks should be able to back up to the store's loading dock.

7. The essence of the responding union's position was that the parties had reached an agreement in December with respect to trucks coming onto the property and being unloaded at the southwest corner. The union asserts that it was only after the January 24th Court decision that the company resiled from this agreement, manufactured a provocative and gratuitous delivery for the purposes of litigation, and then brought the main application in this case. Counsel for the union argues that the restrictions requested would essentially vitiate the right to picket and would deprive employees of a fundamental economic sanction. The resulting harm to the union's efforts to obtain a collective agreement would be irreparable. Counsel also takes the position that interim relief is not available after the main proceeding has commenced, and that the harm to the company is purely financial and thus not appropriate for interim relief.

8. Section 92.1 provides as follows:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

(2) A party to an interim order may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

9. The language of section 92.1(1) makes it clear that the Board has a large measure of discretion in determining applications for interim relief. In applying this section, the Board has considered both whether the applicant has an arguable case on the main application, and whether the possible harm which might flow from granting the application outweighs that which may occur if the requested relief is denied. With this basic framework in mind, the Board has also considered such factors as delay, whether the harm is purely economic, the preferred labour relations circumstances to be preserved or created on an interim basis, the preservation of a meaningful remedy on the main application, the effect on the process of collective bargaining or the collective bargaining relationship, the scheme of the Act, and broader public or labour relations policy considerations.

The Board's assessment takes place in the context of its specialized expertise in labour relations and the administration of the statutes it applies. (See: *Loeb Highland*, [1993] OLRB Rep. Mar. 197, *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358, *Price Club Canada Inc.*, [1993] OLRB Rep. July 635, *Blue Line Taxi Company Limited*, [1993] OLRB Rep. Aug. 793, *La Section catholique du Conseil scolaire de langue française d'Ottawa-Carleton*, [1993] OLRB Rep. Sept. 844, *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. Mar. 242, *The Hydro-Electric Commission of the City of Ottawa*, [1993] OLRB Rep. Nov. 1231, *Metropolitan Toronto Apartment Builders Association*, [1993] OLRB Rep. Mar. 219, *The Bay-Kingston, et al.*, [1993] OLRB Rep. Dec. 1350, and *Fort Erie Duty Free Shoppe Inc.*, [1993] OLRB Rep. Dec. 1307 and *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019.)

10. Turning to the arguments in this case, we are not persuaded by the union's view that interim relief is not available because a hearing has already commenced on the main application. Section 92.1 refers to either an intended or a pending proceeding in setting out the circumstances in which the Board may grant interim orders. "Pending" is defined in part in the Concise Oxford Dictionary (J. B. Sykes ed. Oxford: University Press, 1985) as "undecided, awaiting decision or settlement". Black's Law Dictionary (H. C. Black, St. Paul: West Publishing Co., 1990) includes the following definition:

"Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is "pending" from its inception until the rendition of final judgment."

11. In the case at hand, the fact that hearings have started does not suggest to us that the main application is no longer pending. Rather, it is more consistent with both the definitions set out above and the Board's usage and practice to say that the main application is pending until it is finally determined. Of course to the extent that an application for interim relief coincides with the hearing of the main application, this may have implications with respect to the balance of harm if a final decision can be anticipated shortly. However, this is a matter of discretion with respect to the appropriateness of an interim order, rather than an issue relating to the Board's jurisdiction.

12. The appropriateness of interim relief depends largely on a consideration of the kind of factors set out above. In this regard, the Board commented on the requirement of an arguable case in *Loeb Highland, supra*, to this effect:

21. Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgement of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, section 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.

22. This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of

interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.

23. Our practical concern that the Board's decisions on interim relief be insulated to some extent from the merits of the main application is reinforced by the language of section 92.1(1), which provides that an interim order can be obtained in an intended proceeding as well as in one already filed. If an interim order is available even before the main proceeding has been commenced, it suggests that interim relief is less dependent upon the main application than one might otherwise think.

24. Moreover, a number of the provisions of the *Labour Relations Act*, including some of those which the applicant alleges were breached in the complaint in this matter, are subject to a reverse onus where a responding party must establish that it did not violate the Act. The effect is to complicate an assessment of the merits, including the issue of what would constitute a *prima facie* case in these circumstances. In addition, the interim order power contained in section 92.1 applies to an extensive package of legislative amendments, many of which involve new or reshaped jurisdiction for the Board. This means that it may be difficult to evaluate the strength of the merits of any particular case, at least until the Board has had an opportunity to develop case law in these new areas. Lastly, even where the Board can rely on well-established jurisprudence, there must be some allowance for novel arguments to be presented to it from time to time. While no tribunal encourages frivolous applications, it is also true that the Board must be responsive to changes in labour relations if its jurisprudence is to remain vital and relevant.

25. At the same time, it is clearly essential that there be some connection between interim relief and the merits of the main application. Common sense suggests that an interim order is inherently subordinate to the main application, a proposition which is given added cogency in this context by Rule 88. That rule makes it clear that a copy of the main application must be filed along with the request for an interim order, which to some extent offsets our view of the effect of section 92.1 in intended proceedings. Isolating the interim application by the absence of any requirement with respect to the strength of the main application might also carry with it the possibility of abuse, and might strand the Board in a situation where grounds for an interim order might be made out but the main application was entirely and obviously without any merit whatsoever.

26. With this in mind, we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act. While leaving room for some innovation by parties, such a test protects the integrity of the Board's processes by precluding interim relief where the main application is frivolous or vexatious. This provides the Board with an element of security and some coherence between the main application and the interim relief power, but gives recognition to our other concerns described above.

27. We also find it more appropriate to consider this requirement as simply one ingredient in a test for interim relief, rather than an initial threshold of some kind. Setting up an assessment of the merits as a preliminary hurdle in an interim relief test suggests a two-step analysis which we find unnecessarily formal in the circumstances.

13. The Board subsequently noted in *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242 that an applicant did not have to make out a strong case, but merely a plausible one. In *Morrison Meat*, *supra*, the Board added that to the extent that an applicant's case was capable of meeting a more rigorous standard, that may be a factor that the Board will consider as well.

14. In this case, the company argues that the Board should impose restrictions because the facts it alleges amount to a breach of the common law. If the picketing is in breach of the common law, counsel states, it necessarily constitutes undue disruption within the meaning of section 11.1, and this entitles the company to relief. While counsel reiterated that the conduct which was the

subject of the main application was illegal, it was not suggested that it was a violation of the *Labour Relations Act* or any other statute which the Board administers.

15. We have some significant reservations about the proposition that an alleged breach of the common law automatically translates into restrictions on picketing under section 11.1. To obtain a remedy at the Board, an applicant must bring itself within the tests set out in section 11.1 which provides as follows:

11.1-(1) This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.

(2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. Attempts to persuade the employees may be made only at or near but outside the entrances and exits to the employees' workplace.

(3) During a lock-out or lawful strike, individuals have the right to be present on premises described in subsection (1) for the purpose of picketing, in connection with the lock-out or strike, the operations of an employer or a person acting on behalf of an employer. The picketing may occur only at or near but outside the entrances and exits to the operations.

(4) No person shall interfere with the exercise of a right described in subsection (2) or (3).

(5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.

(6) An application respecting the exercise or alleged exercise of a right described in subsection (2) or (3) may be made only to the Board and no action or proceeding otherwise lies at law.

(7) A party to an order made under subsection (5) may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(8) In the event of a conflict between a right described in subsection (2) or (3) and other rights established at common law or under the *Trespass to Property Act*, the right described in those subsections prevails.

The priority over the common law set out in section 11.1(8) and the comprehensive structure of these provisions suggests that section 11.1 may provide a complete code with respect to the Board's jurisdiction on picketing. The role of the common law in this scheme is far from obvious. At the very least, the equation that a breach of the common law amounts to undue disruption under section 11.1 is too general a proposition to be compelling. Presumably there may be overlap in the sense that some activities will represent both a breach of the common law and undue disruption within the meaning of section 11.1. On the other hand, some conduct which may be tortious or otherwise contrary to common law doctrine may have little or no disruptive effect. We note in passing that there has been no judicial finding with respect to the common law and picketing at this store; rather the decision of January 24, 1994 addresses activity at Store 808.

16. It was apparent that the company wished the Board to approach the application of section 11.1 in a manner which would essentially mirror the common law regime, at least in terms of the impact on the parties, if not in terms of analysis. Where jurisdiction in this area has been transferred from the Courts to the Board and a new statutory test adopted, it is not clear that such an approach is even available to the Board. Among other things, simply as a matter of statutory interpretation, it seems unlikely that the Legislature would go to such lengths to fashion a new regime, with the intent that it replicate the results of a pre-existing one.

17. Nevertheless, we are prepared to assume, without finding, for the purposes of this matter that the company has an arguable case because we are not inclined to grant an interim order for reasons relating to the balance of harm.

18. Turning to the parties' arguments in this regard, we find ourselves firstly unconvinced by the union's position that interim relief should not be granted because the possible harm to the company would be purely economic. The Board's cases in this regard, including *Morrison Meat, supra*, and *Blue Line Taxi, supra*, indicate that one of the factors the Board may consider is whether the harm cited in support is monetary and can be adequately addressed in the main application. In this case, however, although the harm asserted by the company is financial in nature, it is not apparent that there is any forum for subsequent compensation if it is successful in the main application. In that sense, the situation can be distinguishable from the Board's other cases in this regard.

19. On the other hand, the company is asking us to restrict the exercise of a statutory right under the Act, albeit on an interim basis. In addition, if picketing rights of employees are restricted to the extent the company has requested, the effect will be to essentially nullify a crucial aspect of the economic sanctions they can bring to bear to reach a collective agreement. Even a less restrictive order is likely to have a significant impact on their rights. Again there is no forum for redress or cure for the labour relations harm stemming from granting an interim order in this regard.

20. We also find it difficult to address the general assertions made by the company about the conduct of the picketers and resulting harm without reference to specific incidents. As the Board noted in *Metropolitan Toronto Apartment Builders, supra*:

21. In applications for interim relief, the materials on which the Board bases its determinations are essentially the pleadings accompanied by written declarations. Under the Board's Rules of Procedure, there is no provision for cross-examination on these declarations. The Board may schedule an oral hearing, as it did here, to hear the parties' submissions. It is evident that great reliance is placed on the written declarations. Thus, it is reasonable to expect these declarations to contain a certain level of detail and specificity, at least with respect to those matters which should be within the knowledge of the parties, such as the harm that will occur. Absent this, parties will encounter some reluctance from the Board about relying on broad statements without any supporting facts.

In this case before us, the lack of supporting detail makes these general assertions less compelling than they might otherwise be.

21. This brings us to the issue of delay. The Board has said in a number of interim relief cases that delay may be a significant factor in its consideration. In *Morrison Meat, supra*, the Board dealt with a case where approximately three months had passed between the time of the events complained of and the interim order application. The Board made the following comments on the issue of delay:

19. A further factor which the Board may consider is expedition from at least two perspectives. There is no statutory time limit with respect to the bringing of an application for an interim order. However, given the emphasis placed on expedition in both the statute and the rules (the present matter came on for hearing within 5 days of the filing of the application), the Board will expect applications under section 92.1 to be filed in extremely close proximity of the events giving rise to the application. An applicant who delays undermines its own ability to convince the Board of any urgent or pressing need for interim relief. Perhaps more important, however, as the passage of time between the events giving rise to the request and its determination increases so too does the Board's ability to quickly intervene decrease. Furthermore, and at least to the extent that granting an interim order interferes with an employer's management of its enter-

prise, the length of time during which an employer's action has been implemented may easily impact on the harm consequent from any Board order effectively undoing that measure, even on an interim basis.

22. Similarly, in *Price Club, supra*, the Board noted that a delay of only a month "lends considerable credence to the responding party's contention that the matter is not sufficiently urgent in nature to warrant the granting of an interim order". In *La Section catholique, supra*, where there had been a delay of some three months, the Board also commented that "the lack of expedition suggests a lack of urgency" and the Board made similar observations in the *Metropolitan Toronto Apartment Builders* case, *supra*.

23. In the matter before us, the picketing and the southwest corner arrangement at Store 109 have been ongoing since last December. The company concedes that it has not had direct access to the store's loading docks "for a long time". The only action the company has taken with respect to this store was to restrain picketing around the perimeter of the property, which resulted in the consent order of December 20th. No action was taken with respect to the picketing which was the subject of this application until January 28, 1994 when the main application was filed. The parties advise us that they expect the main application to be completed this week, which amounts to two more days of hearing. Normally, the Board will attempt to issue at least a bottom line decision quickly in a picketing case, so the situation is likely to be addressed on the merits very soon. (As it turned out, the strike settled before a decision could be issued on the main application, so expedition was not an issue.) Of course, the short duration of any interim order has implications for the harm cited by the union as well. However, if the company has tolerated this situation for more than five weeks, it is not clear that several more days will make a difference in terms of the balance of harm.

24. The company states that it was pursuing litigation relating to other stores. Assuming that this was the case, we do not find that it changes our view. We are not approaching this issue as if it was a matter of fault or estoppel, or a question of the company sleeping on its rights. Rather the issue is a practical one. The company argues that the situation is so pressing that if the harm it asserts continues even for several more days, it would outweigh the harm to the union of restricting the picketing. Where the picketing has been continuing for five weeks and the hearing of the main application is expected to conclude in several days, such urgency is less apparent.

25. There was some suggestion by the parties that delays to trucks had increased since the January 25th incident, allegedly because employees were frustrated by what they viewed as provocative conduct on the part of the company in withdrawing from the southwest corner arrangement and setting up the filmed delivery scenario. Again, in light of the fact that the main application is expected to conclude this week, it appears that the harm alleged by the company in this regard will be addressed on its merits very shortly.

26. In the course of the hearing, the company suggested more limited restrictions on picketing, although it was clear the company remained of the view that at best, the picketing should have only a very nominal effect on the company's operations. However, section 11.1 indicates that the Board is responsible for protecting the new rights created in this provision as well as restricting them, and it is preventing "undue disruption" rather than mere disruption which triggers the Board's authority to impose restrictions. In this context, we do not find that the limitations suggested would change the balance of harm reflected in this interim relief application. As a result, it is not necessary for us to rule on whether we would permit the company to amend its application accordingly.

27. Looking at the matter as a whole, on balance we found that the potential harm of deny-

ing the interim order requested was less than the harm which might flow from granting it, and we dismissed the application.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; August 2, 1994

1. I dissent.

2. In my view, the applicant has made out an arguable case with respect to the merits of the main section 11.1 application, particularly in light of the recent court decision based on an almost identical fact situation (Court File No. 889/93, January 11, 1994). In that case the Divisional Court unanimously determined that the picketers' obstruction of the ingress and egress to the premises constituted unlawful conduct which should be enjoined by this Board. I agree with the applicant's submissions that activity which is deemed by the courts to be unlawful should be enjoined in the interim, pending the disposition of the main application.

3. Furthermore, the balance of harm in this case weighs in favour of the applicant. The Board's jurisprudence indicates that interim relief is not available if the harm complained of in the main application is purely financial, and therefore compensable. However, in this case, although the harm is economic, it may not be compensable. If the applicant succeeds in the main section 11.1 application, it seems unlikely that the economic harm could be the subject of a monetary award given the difficulty of assessing the economic consequences resulting from the interference with the applicant's operations.

4. Finally, although the complaint relates to activity that has been going on since early December, interim relief should not be precluded for reasons of delay. The applicant did not ignore or accept the activity complained of, but on the contrary, had sought a remedy in the court. Given the ongoing nature of the court proceedings involving several of the applicant's operations, including store 109, I am persuaded that this interim application was filed within a reasonable amount of time. As long as the matter is of sufficient urgency and intervention is likely to be effective, and assuming that the other interim relief criteria are met, the Board should allow the interim relief requested.

5. I would have fashioned an interim order along the same lines as the agreement reached by the parties and endorsed by Mr. Justice Wright of the Ontario Court of Justice on December 24, 1993. It would have been appropriate to order that, pending the final disposition of this case, the picketers could delay the trucks for a period of five minutes in order to convey information to the driver, up to a maximum of thirty minutes as long as the driver wished to receive more information.

1248-93-R; 1346-93-U Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414, Applicant v. **The Great Atlantic & Pacific Company of Canada, Limited**, Responding Party v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its local affiliates Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, 429, 545, 579, 582, 915 and 991, Intervenor; Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 461, 1000, Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, and the United Steelworkers of America, Applicants v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Responding Party

Evidence - Practice and Procedure - Reconsideration - Union Successor Status - Objecting employees seeking reconsideration of Board's decision declaring Steelworkers' to be successor union to RWDSU on grounds that the employer had posted no notice of the proceeding in the workplace - At conclusion of objecting employees' case, employer making motion for early dismissal of the reconsideration application - Board reviewing jurisprudence and policy considerations associated with procedures for facilitating swift, balanced hearings which combine expedition and full opportunity to be heard - Board not requiring employer or Steelworkers' to make election as to whether to call evidence or not, but dismissing employer's motion

BEFORE: *Judith McCormack*, Chair.

DECISION OF THE BOARD; August 10, 1994

1. Board File 1248-93-R is an application for reconsideration with respect to a decision of the Board issued on September 23rd, 1993, in which the Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 ("Steelworkers") was found to be a successor union to the Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414. The successor declaration under section 63 of the Labour Relations Act applied to a bargaining unit of employees who work at sixty-nine stores in Ontario operated by the Great Atlantic and Pacific Company of Canada, Limited ("A & P"). The applicants, fifteen employees in the bargaining unit, were joined in their request for reconsideration by the Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers Union ("UFCW"). Board File 1346-93-U is an unfair labour practices complaint filed by the Steelworkers against UFCW on which hearings were held but a decision has not yet issued.

2. The background to this dispute is set out in detail in the Board's decision of September 23rd, 1993 [now reported at [1993] OLRB Rep. Sept. 885], and in an interim order issued by the Board in other proceedings dated December 17, 1993 [now reported at [1993] OLRB Rep. Dec. 1353]. To sketch a very simple outline, in the spring of 1993, the American parent of Retail, Wholesale and Department Store Union decided to merge with the United Food and Commercial Workers. The merger was opposed by the majority of locals in Canada, who purported to disaffiliate from the parent union, establish a separate organization, and merge with the United Steelworkers of America. A small number of Canadian locals joined in the merger with the United Food and Commercial Workers. The Steelworkers and UFCW then engaged in a massive conflict reflected in part by a profusion of legal proceedings before the Board.

3. The original proceedings in these files commenced in August of 1993. At that time the parties included the Steelworkers, UFCW and A & P. They advised the Board that while there were a large number of bargaining units involved, they considered the one before the Board to be a "test case", and they expected that it would result in settlements for the other units. The Board therefore heard these matters on an expedited basis in the hope of bringing this widespread dispute to an early conclusion. In the hearing, which continued for several weeks, A & P took a neutral role while UFCW vigorously contested both the Steelworkers' application for a successor declaration and the unfair labour practices complaint.

4. In the meantime, the Steelworkers filed an application for an interim order requesting various kinds of relief. That application was the subject of a decision by another panel of the Board dated August 12th, 1993. A second application for an interim order resulted in a decision by yet another panel of the Board on September 2nd, 1993. Then on September 23rd, the Board found that the Steelworkers were a successor union entitled to represent a bargaining unit of some 10,000 A & P employees. No decision was issued on the unfair labour practices complaint as it appeared that the successor rights declaration might resolve the matter.

5. The successor declaration did not, however, result in settlements for the other bargaining units. Rather, UFCW changed lawyers and the Steelworkers filed applications for declarations of successor rights for some two hundred remaining bargaining units. Both UFCW and the Steelworkers then applied for interim orders with respect to those proceedings. Another panel of the Board issued its decision in this regard on December 17, 1993.

6. The application for reconsideration of the September 23rd successor rights declaration recites a number of assertions and arguments. Most importantly, however, the applicants also allege that they did not receive notice of the original proceedings. At the same time, the Steelworkers assert that the applicants are merely proxies for UFCW, which, it is not disputed, did receive notice and participated in those proceedings. Since those facts might be significant with respect to an application for reconsideration, and since they were contested, this case was listed for hearing so that the parties could adduce evidence in this regard. At the end of the applicants' evidence, A & P made a motion for early dismissal of the reconsideration application, supported by the Steelworkers. The motion was opposed by the applicants and UFCW. Counsel for UFCW had previously advised the Board that it did not intend to call any evidence.

7. The hearing was adjourned to allow the Board to rule on the motion. Before such a ruling could issue, the Board was advised that UFCW and the Steelworkers had entered into a global settlement of their differences. In light of that settlement, the Board directed that if any party wished to pursue either the application for reconsideration or the unfair labour practices complaint further, it had to advise the Registrar accordingly by July 22nd, 1994.

8. Since the Steelworkers have not so advised the Registrar in regard to Board File 1346-93-U, I conclude they are not pursuing the unfair labour practices complaint further, and those proceedings are terminated.

9. In regard to Board File 1248-93-R, the Steelworkers and UFCW have indicated that the only outstanding issue as far as they are concerned is an amendment to the scope of the successor rights declaration reflecting one aspect of their settlement. However, counsel for the applicants for reconsideration has written to the Board indicating that he has been unable to contact nine of his clients. In the absence of a change of instructions, he advises that he cannot agree to the requested amendment and asserts that the Board must complete the reconsideration proceedings.

10. There are several possible options in this situation. However, in light of all the circum-

stances, I have decided to issue my ruling on the procedural issue before me and reconvene the hearing. Notices of the hearing will be sent to the individual applicants indicating that if they do not attend at the hearing, the Board may dispose of the application for reconsideration in their absence.

11. Accordingly, I now turn to the motion for early dismissal. One of the issues in dispute before me was whether the Board should require A & P or the Steelworkers to elect not to call evidence before it would entertain the motion. Counsel for A & P took the position that the nature of the motion was one of early dismissal, rather than non-suit, and as a result, he was not required to make such an election at this point. He reviewed a number of cases in both British Columbia and Ontario to support the proposition that there is a distinction between a case where there is no evidence, and a case where there is insufficient evidence. In the former, at least in British Columbia there is authority to the effect that an election is not necessary; in the latter, a party has been put to its election. Counsel was of the view that the applicants had not established any evidence that should lead to reconsideration by the Board. In any event, counsel argued, the Board has indicated that it has discretion as to whether a party should be put to its election, even in circumstances where there is insufficient evidence, and this was a case where such discretion should be exercised against requiring such an election. In support of his arguments with respect to the matter of election, counsel cited *Re Unitel Communications Inc. and Canadian Association of Communications and Allied Workers* (1991), 18 L.A.C. (4th) 367, *Sun Parlour Greenhouse Growers' Co-operative Limited*, [1971] OLRB Rep. Nov. 743, *Belkin Toronto Paperboard Mill*, [1985] OLRB Rep. Dec. 1698, *Goldcrest Furniture Ltd.*, [1989] OLRB Rep. Sept. 967, *Paul Balkos*, [1989] OLRB Rep. Sept. 932, *Russell H. Stewart Construction Company Limited*, [1990] OLRB Rep. April 464, *Municipality of Metropolitan Toronto v. Joint Board et al.* (1991), 6 O.R. (3d) 88, *Hurley Corporation*, [1992] OLRB Rep. Aug. 940, *Kenneth Edward Homer*, [1993] OLRB Rep. May 433, *Re General Tire Inc., Barrie and United Rubber Workers, Local 536* (1991), 24 L.A.C. (4th) 234, *Canadian Broadcasting Corporation* (1991), 24 L.A.C. (4th) 250, and *Re Christie Brown & Co. (Division of Nabisco Brands Canada Ltd.) and Bakery, confectionery & Tobacco Workers, Local 426* (1992), 26 L.A.C. (4th) 447. Counsel for Steelworkers adopted A & P's arguments in this regard.

12. Counsel for UFCW argued that the motion was in essence a non-suit motion, and that the Board should not entertain it unless both A & P and Steelworkers elected not to call any evidence. He noted that the distinction between early dismissal and non-suit has not been drawn in Ontario, unlike British Columbia, Alberta, and in federal labour jurisprudence. In counsel's view, the Board's normal practice aside from *Hurley*, *supra* and *Homer*, *supra*, was to put a party to its election, and there is no reason to depart from that in this case. He argued that A & P and the Steelworkers were attempting to "test the waters" and should not be successful in this regard. In support of his views, he cited *Canada Post Corporation* (1993), 34 L.A.C. (4th) 36, *Western Versatile Construction Corporation* (1988), 1 CLRBR (2d) 58, *Majorcsak et al v. Na-Churs Plant Food Co. (Canada) Ltd. and Lammens* (1964) 2 O.R. 38, *The Board of Education for the City of Windsor*, [1984] OLRB Rep. Aug. 1145, *Ontario v. Ontario Public Service Employees Union et al.*, (1990), 37 O.A.C. 218, and John Sopinka and Sidney Lederman, *The Law of Evidence in Canada*, Toronto: Butterworths, 1992, in addition to some of the cases referred to by the other counsel.

13. Counsel for the applicants made a number of the same arguments as counsel for UFCW. Among other things, he was also of the view that the motion had been put purely to solicit an evaluation of the case from the Board, and that the requirement for election was essential to prevent one party from obtaining a strategic benefit in this regard. He argued as well that if there was no requirement to elect, employees would unfairly treated and the appearance of justice would be impaired. Counsel then reviewed in detail a number of the cases set out above, in addition to

Representatives Association of Ontario; Local 414 of the Retail, Wholesale and Department Store Union, AFL-CIO-CLC Board File No. 1810-89-U, April 2, 1991 (unreported), *Bank of Montreal v. Horan et al* (1986), 54 O.R. (2d) 757, *Corporation of the City of Toronto* (1984), 17 L.A.C. (3d) 273, *Corporation of the City of York* (1989), 6 L.A.C. (4th) 347, *Ottawa Board of Education* (1992), 26 L.A.C. (4th) 219, Jeffrey Sack and Michael Mitchell, *Ontario Labour Relations Board Law and Practice* Toronto: Butterworths, 1985, Allan M. Rock, "The Principles of Non-suit In Ontario" in *Studies in Civil Procedure*, Eric Gertner ed. Toronto: Butterworths, 1979, and Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration*, Aurora, Ontario: Canada Law Book Inc., 1993.

14. The parties were in agreement that the Board has discretion as to whether to require a party to make an election in motions of this nature. Sections 108(1) and 103(13) provide as follows:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

104.-(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.

15. However, counsel for UFCW relied heavily on *Ontario Public Service Employees Union, supra*, for the proposition that the courts had indicated clearly how the Board should exercise its discretion. In that case, the Divisional Court quashed a decision of the Ontario Crown Employees Grievance Settlement Board granting a non-suit motion. In commenting on the decision, the Court was of the view that the wrong standard of proof had been applied in determining the outcome of the motion, and that a motion for a non-suit before an administrative tribunal should conform to the law that governs the courts:

Over the years there has been some variation in the practice on non-suits turning on the question whether the mover must concurrently elect to call no evidence. That has now been resolved. A motion will not be entertained without an election to call no evidence: see *Bank of Montreal v. Horan et al.* (1986), 54 O.R. (2d) 757.

There is no reason to think that a motion for a non-suit before an administrative tribunal should not confirm with the law that governs the courts. The Board applied the wrong standard of proof, but beyond that, it was apparently unaware of its duty to lean in favour of a respondent to a non-suit motion and of its discretion to permit evidence omitted through inadvertence to be adduced.

16. In counterpoint to this decision, however, counsel for A & P and counsel for the Steelworkers rely on the subsequent decision of *Municipality of Metropolitan Toronto, supra*, where the Divisional Court addressed a decision of a joint board under the *Consolidated Hearings Act, 1981* in which the board had granted a motion for early dismissal. In the course of concluding that the board was entitled to control the process of the hearing, the Court refers to *Flamboro Downs Holdings Ltd. V. Teamsters Local 879* (1979), 24 O.R. (2d) 400, a case involving this Board, where the Court said "[c]learly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures ...[i]t is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way." The Court goes on to comment on the joint board's handling of the motion in the following manner:

3. Motion for non-suit

In my view the Board dealt correctly with this argument. It considered the way non-suit is normally dealt with in civil proceedings. It then noted the proceedings before it were quite different than those of a civil proceeding and that Vaughan's motion was more accurately described as a motion of early dismissal. The Board also noted that when it was satisfied (as it must have been) that the application could not possibly succeed, no matter what evidence might come forward, it could provide relief from costs of lengthy and costly proceedings.

In conclusion, I see no error in the approach or conclusions reached by the Board nor in the manner in which the Board exercised its discretion in the control of the proceedings before it.

17. In addition to being a more recent expression of the Court's views, it appears from the references to the *Flamboro Downs* case that the Court in *Municipality of Metropolitan Toronto* is addressing the jurisdiction of a board which is more similar to that of this Board. That case is also consistent with our jurisprudence such as *Hurley, supra*, in which the Board made these observations in the course of deciding not to put a party to its election:

The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put a party to its election. In this regard, the Board will not doubt consider all of the circumstances, including the need for fair, efficient, and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case, the moving party must make its election. To so conclude would be to fetter our discretion, in an area where the Legislature has not indicated that the civil court rules or practices ought to apply. It would be inconsistent as well with the Board's general authority, in section 104(13) of the Act, to "determine its own practice and procedure" provided it gives full opportunity to the parties to any proceedings to present their evidence and to make their submissions.

In *Homer, supra*, the Board adopts these reasons in deciding to grant a non-suit motion without election as well.

18. Although it is clear that the Board has discretion in this regard, earlier cases of the Board reflect a general practice to put a party moving for a non-suit to its election. *Hurley* and *Homer* suggest a more recent trend to consider the merits of such motions even in cases in which such a requirement might be not be appropriate. There are a number of good reasons for some flexibility in this regard.

19. A review of the case law submitted reflects a lively and continuing debate in the area of labour relations with respect to the value of requiring an election on the part of a non-suit mover. That debate is reflected in *Re General Tire Canada Inc., supra*, and the following cases cited therein: *Re Gilbarco Canada and Canadian Union of Golden Triangle Workers* (1973), 1 L.A.C. (2nd) 348, *Re Toronto Public Library Board and C.U.P.E.* (unreported, July 24, 1984), *Re City of Toronto and C.U.P.E.*, Loc. 79 (1984), 17 L.A.C. (3d) 273, *The Crown in Right of Ontario (Ministry of Correctional Services)* (unreported, February 27, 1990), and *Re Canadian Broadcasting Corporation and C.U.P.E. supra*. Roughly put, those who would require such election argue that allowing a party to make a motion of this nature without a downside could result in a party obtaining an assessment of its case from the Board with attendant strategic benefits. This is unfair to the other party, and the motion itself might delay proceedings or cause unnecessary expense.

20. In response, those who would not require election argue that since the time the election requirement emerged in law, legal proceedings have greatly increased in length and expense. If, as counsel for A & P put it, "this dog won't hunt", it is of benefit to all parties to know this at the earliest opportunity. Any procedural disequilibrium can be alleviated by not providing reasons for a

motion which is dismissed, with the effect that an attempt to test the waters will not yield much information.

21. The arbitrator in *Re General Tire, supra*, sets out this useful analysis of the cases and factors in this area in concluding that no election should be required in the case before him:

In a decision of the Ontario Crown Employees Grievance Settlement Board (decision No. 218/89), a panel composed of B. B. Fisher, vice-chairperson and E. Seymour and H. Roberts, members, unanimously concluded that it would not put the union to its election upon bringing a non-suit motion in a dismissal case. In doing so, it considered at length the arbitral jurisprudence surrounding this issue.

In *Re Gilbarco Canada and Canadian Union of Golden Triangle Workers* (1973), 1 L.A.C. (2d) 348 (Carter), the arbitrator considered the cost implications of the practice of requiring an election as follows (p. 352):

In the case of most arbitrations, it is possible to hear all evidence and argument in one day of hearings. If, in a case where a decision had been reserved on a motion for non-suit, the board were required to give the mover of the non-suit motion the opportunity of introducing further evidence after the motion for non-suit has been decided, an additional hearing day would have to be scheduled. This expense could be saved if the parties were required to complete their case at the time of the motion for non-suit.

Admittedly, forcing a party to elect may discourage non-suit motions. It might be argued that this result will put a party to the additional expense of introducing evidence where there is no case to meet. But, in the case of arbitration proceedings, the parties are usually prepared to conduct their business in one day of hearings and all witnesses are normally present on that day. Thus, it is difficult to see how encouraging the parties to complete their cases in that one day would create additional expense.

In the case at hand, as well as in the case before the Grievance Settlement Board in decision No. 218/89, the comments of arbitrator Carter to the effect that parties are usually prepared to complete the case in one day of hearing have no application. Indeed, as vice-chairperson Fisher noted in decision No. 218/89, *Gilbarco* was decided in 1973, when one-day cases seem to have been the norm. Whatever may have been the case in 1973, in 1991 it is rare for a discharge case to be concluded in a single day. Thus, the "cost-effectiveness" of putting a party to its election will vary depending upon the circumstances of the case. It will sometimes be the case that permitting a party to bring a non-suit motion while reserving their right to call evidence should the notion fail has the potential to shorten a hearing, resulting in reduced costs for both parties. This potential cost saving was alluded to in *Toronto Public Library Board and C.U.P.E.* (unreported decision of arbitrator Beatty, dated July 24, 1984), where the arbitrator permitted the employer to bring a non-suit motion without being put to its election.

However, arbitrators have also expressed concerns about possible unfairness inherent in permitting a party to "test the waters" by moving for non-suit while retaining the option of calling evidence if the motion fails. It has been considered to compromise the impartiality of the arbitrator if he or she expresses an opinion on the evidence of one side without hearing all the evidence: see, for example, *Re City of Toronto and C.U.P.E., Loc. 79* (1984), 17 L.A.C. (3d) 273 (Kates).

I agree that for an arbitrator to express an opinion about the evidence led up to a certain point in a proceeding may create an impression of unfairness. However, whether or not it will depends on the nature of the evidence led thus far and the manner in which the decision is communicated. One concern is that, by expressing an opinion about the state of the evidence thus far, the arbitrator will be providing the party bringing the motion with insight into his or her view of the case as it has developed. That could permit a party to tailor its evidence in order to cater to the arbitrator's view of the case. Of course, the party which had to present its evidence first would not have the benefit of such a preview of the arbitrator's thinking. Further, as arbi-

trator Kates points out in *City of Toronto, supra*, the moving party is the only party which benefits procedurally from being permitted to argue its motion while reserving the right to call evidence should the notion fail. According to arbitrator Kates, "... the arbitrator in any event is duty-bound to avoid situations where he or she is placed in the invidious dilemma of favouring one party who can only stand to benefit from the expression of that opinion" (p. 282).

The extent to which a moving party obtains any real procedural benefit from being permitted to move a non-suit without making an election will vary depending on the circumstances. The concern that such a procedure will permit the moving party to plan its strategy based upon what the arbitrator reveals about his or her thinking is a real one. In decision No. 218/89, vice-chairperson Fisher concisely articulated the potential problem, and at the same time set out a solution (pp. 7-8):

... it seems inappropriate for a board such as the Grievance Settlement Board, which is constantly determining disputes between the same parties, to express full reasons as to why one party has failed to prove a *prima facie* case. This would be the equivalent of an "arbitral time-out" in which the opposing party has the opportunity to find out what the board is thinking, and then plan its strategy for the rest of the case. In a situation like this, one would expect a motion for non-suit in every case, as it would provide a useful advantage in every case to the moving party, whether or not they had any chance of winning a motion of that sort.

However, these fears can be eliminated if the board gives no oral or written reasons in the event the motion is dismissed. Of course, if the motion is upheld, full and proper reasons would be provided, as then the motion would end the case. A mere indication by the board that the motion was dismissed would not give a tactical advantage to either party. This was the procedure adopted by chairperson Ratushny (who is also a vice-chairperson of the Grievance Settlement Board) in *Ontario Human Rights Commission and Abany v. North York Branson Hospital and Hill*, 9 C.H.R.R. D/4975.

(Emphasis added.) The board then went on to find that it was appropriate, looking at the interests of expedition and fairness, to rule that it was proper for the union to be able to present its motion for non-suit without being put to its election.

22. *Re Canadian Broadcasting Corporation, supra*, represents a similarly thoughtful review in which an arbitrator comes to the opposite conclusion.

23. Common to both points of view, however, is an overwhelming concern with procedural fairness. This appears to be a more useful focus for analysis than a distinction between motions for early dismissal and non-suits, or a differentiation between no evidence and insufficient evidence. In the first place, it does not seem that such distinctions have dominated in Ontario. Secondly, the cases in this respect appear for the most part to represent ways in which various adjudicators have wrestled with some of the competing values canvassed above, and their arrival at different points of balance in this regard. In some cases, these distinctions are also used to support an exception to formal rules of civil litigation which the Board is not bound by in any event. This suggests that the way in which the Board exercises its discretion in this area should be related more to the underlying issues of fairness than to such fine and possibly fragile distinctions.

24. It is also clear that the various labour adjudicators referred to above recognize that in an area of law where it has long been the axiom that "labour relations delayed are labour relations denied", fairness does not simply involve an opportunity to be heard in a narrow sense. Rather, such an adjudicative environment requires a multi-dimensional concept of fairness which recognizes the importance both of being heard, and of being heard in a timely and accessible fashion. Such a comprehensive view of fairness is particularly critical for this Board, which has as its mandate providing speedy, informal dispute resolution in a context of labour relations expertise, and which handles cases that are often extraordinarily time-sensitive.

25. This means that the Board must facilitate swift, balanced hearings which combine both expedition and a full opportunity to be heard. In pursuit of this mandate in what is now a highly sophisticated legal milieu, the Board does not always have the luxury of relying on well-established procedural doctrine. This is because such formulas can interfere with both the expedition and informality of hearings. As a result, the Board's practice has been to obtain the benefit of such doctrines where possible, and modify or dispense with them where necessary. In addition, the Board has developed or adopted practices tailored to the needs of labour relations litigation. Some of these are reflected in its Rules of Procedure; others involve the informal application of hearing management skills. A number are directed at providing the parties with various kinds of guidance during the course of the hearing.

26. For example, the Board's rules allow it to dismiss an application without a hearing in certain circumstances:

Rule 24. Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its reasons. The application may within twelve (12) days after being sent that decision request that the Board review its decision.

27. Similarly, once the hearing is under way, the Board may in the course of its evidentiary rulings indicate to the parties not only what is admissible, but what is likely to have significant probative value. It may focus the hearing so that it does not mushroom, or spin out of control on collateral issues, and it may ask the parties to address particular points in argument. Efforts may be made to narrow the scope of the proceedings, or the Board may advise a party in appropriate circumstances that it is not necessary to address a particular issue in argument. On occasion, where the evidence has taken a definitive turn, it may ask the parties whether the assistance of one of the Board's mediators might be helpful.

28. These are only a few examples of the kind of practical ways in which the Board may facilitate the hearing of cases by providing parties with some indication of its views as the hearing progresses. There is no doubt that these methods must be employed with great care and skill; yet they are as critical to the running of a fair hearing in the comprehensive sense as more formal procedural rules may be. Of course, they are not unique. Indeed, some are simply borrowed or modified versions of good hearing practices in other forums. In an administrative setting, however, where more established doctrines have a lower profile, these informal tools take on greater prominence.

29. Some flexibility in addressing non-suit or similar kinds of motions is part of the spectrum of ways in which the Board can facilitate fair hearings. In other words, there are times when a party's ability to "test the waters" is of benefit to all parties in bringing to an end lengthy and expensive hearings which are headed nowhere. It is true as well that the strategic benefit to the mover may be minimized by the absence or brevity of reasons for an unsuccessful motion. Upon reflection, moreover, one aspect of strategic advantage may not loom as large as at first glance. In fact, it is accurate to say that legal proceedings are riddled with fluctuating strategic advantages and disadvantages, brought about by a wide variety of factors including access to information, choice of counsel, ability to fund legal proceedings, the application of various legal onuses and evidentiary rules, and so forth. The latter are not whimsical; all have rationales, some more weighty than others. This means, however, that the issue is not simply whether there is a strategic advantage or not, but whether it is in aid of another more important purpose. Thus the unfairness of a strategic benefit to one party must be balanced against the unfairness to both parties of allowing a futile hearing to continue, with the attendant cost and uncertainty to them. It seems especially

unconscionable to allow the cost of losing to escalate when the outcome is clear. If the Board is to maintain effective control over the fairness of its proceedings, there are times when it must be able to bring an ill-fated case to a merciful conclusion.

30. Having said that, however, there is considerable merit in the concerns of those requiring election. It does a disservice even to a comprehensive view of fairness to allow the expedition of a case to be compromised by frequent or lengthy motions. In addition, opportunities for pre-hearing discovery are limited in the Board's procedures, with the effect that there will be some degree of discovery at the hearing. There are many matters in which a party will often have little choice but to attempt to make its case through cross-examination of an opposing parties' witnesses, simply because it will not have the kind of information available to otherwise prosecute its case. In some of those situations, a reverse legal onus provides parties with assistance; in others, the onus is on the applicant. Of course, this information deficit does not at the present time prevent a non-suit motion where the mover elects not to call evidence; however, it represents another reason for some hesitation in making such motions easier. Moreover, in a forum where hearings are conducted along less formal lines, it is still essential to protect the values which have given rise to a number of more established doctrines, even where the doctrines themselves may be too rigid. It may well be that having regard to the interplay of the many ingredients that make up a fair hearing in any given case, allowing a non-suit motion without an election will be handled with caution, at least until the Board can assess and evaluate its practical experience in this regard.

31. With this in mind, I now turn to the motion before me. At the outset, it is worth noting that this is an application for reconsideration, not an original hearing. The grounds on which the Board will reconsider a decision are quite limited. In *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, the Board made these comments with respect to its powers of reconsideration:

To avoid abuse of the reconsideration provision and bring some finality to its decisions, the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened.

32. Normally, the Board does not hold hearings on an application for reconsideration. This is why Rule 83 of the Board's Rules of Procedure requires an applicant to submit complete written representations in support of its request. In many cases when the Board receives a request for reconsideration, it determines that it does not require opposing submissions because the applicant's submissions have not been persuasive. This is why Rule 84 describes what should be included in a response "[w]here a party is directed to file a response". In other words, responses are only filed upon the direction of the Board, in contrast to original proceedings where responses are to be filed automatically. In many cases, the responding party to an application for reconsideration is not directed to file a response at all. In a rare case such as the present one, the Board will hold a hearing because there is some factual dispute which may be significant to the disposition of the application for reconsideration. In general, however, it is fair to say that the Board's procedures for applications for reconsideration contemplate that they may be dealt with briskly, and without calling upon a party to meet an unpersuasive case. And of course, no election is required in circumstances where the Board determines that it can dispose of an application without a response.

33. In these circumstances, some of the concerns which lie at the root of the election requirement are less compelling. If the Board normally determines whether to call upon a party for a response to an application for reconsideration without requiring an election, an election requirement on a motion such as this in the same kind of case seems a little incongruous.

34. This is given added emphasis by the fact that there is no requirement for a party who requests the application of Rule 24 to make an election with respect to evidence. Of course, some of the concerns in regard to soliciting evaluations of the evidence will not be present at the beginning of a case. However, it is clear that a party may obtain an assessment of its legal arguments in this manner, and the Board will often provide reasons when such a motion is dismissed. Moreover, it may well be that in some cases involving reconsiderations, soliciting an assessment of a case may have less strategic value in a situation where there have already been proceedings culminating in a Board decision in the first instance. Presumably both parties may have already had an opportunity to sample the Board's thinking on at least some aspects of the case in those circumstances.

35. In this case, expedition was essential at the time of the motion. The matter before me represented the tip of an iceberg with respect to a massive, high stakes dispute between two large unions. The volatile and uncertain conditions in which this application was filed had already given rise to two applications for interim orders in this particular matter, and two other applications covering the approximately 200 outstanding successor rights applications. In other words, the longer the proceedings took, the more collateral litigation they spawned. In addition, while the Board's various interim orders provided at least some measure of stability, they shifted the burden of urgency from the Steelworkers to UFCW. As the Board recognized in its decisions on the interim orders, stabilizing this situation on an interim basis had the unavoidable effect of providing the Steelworkers with a practical advantage in this extensive inter-union battle. While such orders were critical in light of the widespread disruption to labour relations, there is no doubt that the longer these proceedings continued, the greater the impact of orders which were intended to be interim only.

36. At this point, the settlement has eliminated many of these concerns. However, it is still important to crystallize the situation and address it in a cost-sensitive manner given the global settlement and the consequential reluctance of the two main protagonists to engage in the litigation.

37. Counsel for A & P and the Steelworkers respectively advised that they had a number of other witnesses they might call if the motion was unsuccessful, and that there is an unresolved dispute with respect to documents which promises to take some time as well. Discovery in the sense described above is not as significant an issue, since counsel for A & P already disclosed the gist of his evidence to the other parties. Having regard to the circumstances before me as a whole, and in light of the considerations set out above, I am not prepared to require either A & P or the Steelworkers to make an election as to whether to call evidence or not.

38. Turning to the merits of the motion, however, in my view it cannot succeed. Given my comments above, I am prepared to give very brief reasons for my conclusion which do not address the specific arguments made by counsel on the motion. This provides the parties with some guidance while minimizing any strategic benefit.

39. Both counsel for A & P and the Steelworkers couched their arguments in terms of there being no evidence, or insufficient evidence for the Board to reconsider the decision of September 23rd. The latter is a narrowly defined term in the jurisprudence before me, and both exclude consideration of the credibility of witnesses. In fact, their arguments do not fit easily into the more definitive analytical framework of either of these categories. It would be more accurate to characterize these submissions as simply assertions that the applicants have a weak case or even a very

weak case. This calls for the kind of nuanced evaluation of the both the law and the evidence that normally takes place at the conclusion of a case, and which is not available on this kind of motion. As a result, the motion is dismissed.

40. However, it is critical that the parties understand what my decision in this regard does not address. My dismissal of the motion does not relate to the sufficiency of the evidence before me in the usual sense, but only to the narrowness of the test developed on this kind of motion. Counsel making the motion have expressed emphatic views with respect to the strength of the applicants' case in the course of their argument. It would not be surprising if those views influenced their approach to their respective cases should it be necessary to proceed further at the hearing.

41. My decision to dismiss the motion makes it unnecessary to address the other arguments in regard to whether the motion should be entertained at all.

0231-94-R; 0232-94-R North Bay Newspaper Guild, Local 241, The Newspaper Guild (CLC, AFL-CIO), Applicant v. **The North Bay Nugget**, A Division of Southam Inc., Responding Party

Bargaining Unit - Certification - Combination of Bargaining Units - Union already representing full-time production and non-production employees in separate units with geographic description covering Province of Ontario - Union applying to be certified for single unit of part-time employees covering Province of Ontario - Employer without employees at locations other than North Bay and Sturgeon Falls - Board finding single bargaining unit of part-time employees in North Bay and Sturgeon Falls to be appropriate - Interim certificate issuing - Union applying to combine the units - Board rejecting employer's submission that serious labour relations problem created by shift in bargaining power or possibility that printing operation and newspaper operation would both be shut down in event of strike - Board directing that two full-time units be combined with interim certified part-time unit

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

APPEARANCES: *M. Lewis* and *John Bryant* for the applicant; *Vince Johnston* for the responding party.

DECISION OF THE BOARD; August 29, 1994

1. Board File No. 0232-94-R is an application for certification; Board File No. 0231-94-R is an application to combine bargaining units.

2. In 1989, the North Bay Newspaper Guild, Local 241 ("the Guild" or "Local 241") was certified as the bargaining agent for full-time employees of the responding party with respect to two bargaining units, one for the full-time production employees and one for the full-time non-production employees. The applicant is currently seeking certification with respect to a unit of part-time employees including both production and non-production employees. At the same time, the applicant filed an application pursuant to section 7 of the *Labour Relations Act* to combine the proposed part-time bargaining unit (if certified) with the two existing full-time units to form one unit

of all employees of the responding party. The applicant proposed the Province of Ontario as the geographic scope of the proposed bargaining unit in order to mirror the geographic scope set out in the existing full-time bargaining units.

3. The responding party objected to the bargaining unit description proposed by the applicant on two bases. First, the responding party requested that the Board follow its standard “mirroring” policy and declare that the appropriate units are two separate units, one for part-time production employees and one for part-time non-production employees. Second, the responding party asked that the Board follow another standard policy and describe the bargaining unit on a municipal-wide basis, covering only those areas where the employer actually employs employees. In this case, the employer currently employs employees in North Bay and Sturgeon Falls.

The Facts

4. The Board heard the evidence of Jim Steffan, Circulation Supervisor and President and formerly Treasurer of the North Bay Newspaper Guild; John Bryant, Canadian Director of the Newspaper Guild; and Paul Chapman, Production Manager of the North Bay Nugget. For the most part the facts were not in dispute.

5. The North Bay Nugget, a Division of Southam Inc. (“The Nugget” or “the employer”) is a newspaper publication. It also operates a commercial printing operation, printing T.V. Guides and circulars for outside clients.

6. The Nugget is published from the North Bay office, where most employees work. The Nugget is organized into a number of departments including the business department, the advertising department (subdivided into the classified department and the desk top department), the editorial department, the production department and the circulation department.

7. There are approximately sixty-six full-time employees; seventeen in the production department and forty-nine in the other departments. There are approximately forty-four part-time employees; twenty-seven in the production department and seventeen in the non-production departments. There is a mix of skilled and unskilled workers in both the production and non-production department.

8. Apart from those employees working in the Sturgeon Falls office, all the employees work together in a two-storey building in North Bay. They share the same smoking room and lunch room. The departments operate as an integrated whole with the primary purpose of publishing of the newspaper. The editorial department gathers the news and lays out the stories, photographs and advertising obtained from the advertising department. The layout is then sent to pre-press in the production department, where the newspaper sheet is shot and transformed to the printing press to print the paper. After the printing of the newspaper, the inserters insert any flyers or circulars; the newspapers are then wrapped. The circulation department is responsible for distributing the paper to customers, stores, vending boxes etc. There is some interaction between employees from the various departments. For example, the production department may contact the circulation department to enquire about the number of inserts required. The circulation department in turn contacts the business department to obtain this information and passes it on to the production department. Similarly, there is some contact between employees in the desk-top section of the advertising department with employees in the pre-press department to confirm the suitability of advertising. There is less interaction between part-time employees, although part-time employees doing deliveries interact to employees in other departments.

9. The production department has two main functions. One is to print the North Bay Nug-

get newspaper; the other is to print commercial printing. Approximately fifty per cent of the work of the production department is devoted to commercial printing work, which can be produced independently of the other departments.

10. When the applicant initially applied for certification of the full-time employees, they requested one unit. The responding party proposed three units, and the parties settled on two units, one for production employees and one for non-production employees. As a result of the separation of bargaining units, a vote was required of employees in the production department, following which those employees were certified. The certificates for each of the full-time bargaining units contain the geographic scope of the Province of Ontario. At the time of those applications in 1989, the employer had employees working in various locations in northern Ontario. However, since that time those offices have closed and all the employees now work in North Bay or Sturgeon Falls.

11. Although the full-time employees are separated into two bargaining units, the structure of Local 241 is an integrated one. The President, Treasurer and Secretary are elected from the membership at large. There are two Vice-Presidents, one from the production department and one from the non-production departments. There are also two positions at large, one from the production department and one from the non-production departments. Stewards are solicited from all departments; however, the union has not been able to obtain sufficient volunteers to maintain one steward from each department. Generally, grievances for non-production employees are handled by non-production stewards and vice versa, although in the absence of a steward available from their own department, employees are encouraged to obtain the services of any available steward. Local 241 holds joint membership meetings for all bargaining unit employees. There is very little mobility between the units; in the past seven years there has only been one transfer from one bargaining unit to the other.

12. Since the certification of the two full-time units, the union and the employer have engaged in two rounds of collective bargaining. For each round of bargaining, the union sent questionnaires to bargaining unit employees to solicit their concerns. A general membership meeting was held to discuss and vote on collective bargaining proposals. The union's bargaining committee contained representation from each of the departments; the smaller negotiating committee did not. During negotiations the union proposed one set of proposals although they recognized the necessity for two signed collective agreements. The employer submitted two sets of proposals throughout the negotiating process, one for production employees and one for non-production employees. At the conclusion of negotiations, the union held one general membership meeting and discussed the two collective agreements separately. Two votes were held, one for production employees to ratify their agreement and one for non-production employees to ratify their agreement. The resulting collective agreements contained essentially the same provisions with some minor differences with respect to wage rates, shift schedules, and the provision of equipment.

13. Both the union and the employer described their relationship as very positive. The collective bargaining negotiations were never pressed to the point of impasse. The union has never felt the need to call for a strike vote. There have been very few grievances filed since 1989.

14. There was little evidence of any tension between employees in the different bargaining units, except with respect to work transferred from the production department to the advertising department in the last year. Members in the production department became concerned about this loss of work, fearing possible lay-offs of their members. These employees filed a grievance which was subsequently withdrawn, without prejudice, partly on the basis that neither collective agreement contained a work jurisdiction clause. During the second set of negotiations the union did

attempt to negotiate a work jurisdiction clause that would restrict the employer's ability to transfer work away from bargaining unit members. However, the union did not attempt to limit the transfer of work between units. Notwithstanding the withdrawal of the grievance, the members of the production department are still dissatisfied with the transfer of work from their department.

15. A general membership meeting was held with respect to whether to bring this combination application. The meeting was advertised in the normal course, and approximately thirty to thirty-five per cent of the membership turned out and voted in favour of the combination application.

16. The newspaper industry has historically been organized on a very fragmented basis. At the turn of the century, craft unions dominated the scene with separate craft unions representing composing rooms, press plating departments, photo engravers, typesetters and handling employees. In approximately 1935, the Newspaper Guild entered the arena and began organizing editorial employees. Over the years the craft lines became blurred as a result of the demise of the composing room. Many of those composing room employees gravitated towards the Newspaper Guild. As time went on the Newspaper Guild began organizing on a broader basis. Currently, the Newspaper Guild represents various combinations of newspapers employees. At some newspapers they represent only the editorial employees. At other newspapers they represent two units of employees, production and non-production. In other circumstances they represent all the employees. Therefore, there is no set pattern of organizing in the newspaper industry although the trend in recent years has been towards broader based bargaining units.

17. There was limited evidence with respect to the effect of strikes at other newspapers. In some cases the newspapers continued to publish; in other cases they did not.

The Decision

18. The applicant requests that the certification application be considered together with the combination application. Specifically, the applicant requests that the appropriateness of the proposed part-time unit be considered together with the appropriateness of combining the proposed unit with the existing units.

19. The responding party argues that the certification application must be considered separately from the combination application. Although the Board *may* combine a proposed bargaining unit with existing bargaining units, this does not mean that the Board *must* intermingle the issues relevant to a certification application with those issues relevant to a combination application.

20. It appears to the Board that the certification application must be considered together with the combination application. The appropriateness of the proposed bargaining unit description may well be influenced by a proposed combination application. The approach of considering these applications together is supported by subsection 7(2) of the Act, which specifically provides that the Board can consider an application to combine bargaining units with an application for certification. Further, many of the factors relevant to a certification application are also relevant on a combination application, including the viability of stable collective bargaining and the potential for serious labour relations problems.

Certification Application

i) One or Two Part-Time Units

21. The applicant argues that the test the Board should apply in determining the appropri-

ateness of the bargaining unit is whether the unit applied for is viable and whether it will cause serious labour relations issues. (See *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, at paragraph 23; *Simcoe County Association for the Physically Disabled*, [1992] OLRB Rep. July 857, at paragraph 14; and *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226 at paragraph 17.)

22. The applicant argues that the evidence supports that all part-timers have a sufficient community of interest to bargain together viably, and that, with the exception of the Board's mirroring policy, there is no evidence of any serious labour relations problems in granting the one part-time bargaining unit. But for the Board's mirroring policy, it is argued that the one part-time unit would be granted.

23. The applicant acknowledges the Board's mirroring policy as set out in *Sudbury Memorial Hospital*, [1982] OLRB Rep. Nov. 1722 at paragraph 7:

7. ... The Board has, absent any unusual factors, generally followed a policy of having part-time units, organized at the same time or subsequent to full-time units, "mirror" the full-time unit.

(See also *University of Windsor*, [1983] OLRB Rep. Mar. 478 at paragraphs 6 and 7; *Ottawa General Hospital*, [1982] OLRB Rep. Dec. 1867 at paragraph 4; *Ottawa General Hospital* (Reconsideration decision), [1983] OLRB Rep. March 434 at paragraphs 3 and 4; *Belleville General Hospital*, [1983] OLRB Rep. Jan. 7 at paragraph 4; *Geri-care Nursing Home of Caressant Care Limited*, [1986] OLRB Rep. Oct. 1338 at paragraphs 14 to 17.)

24. However, the applicant argues that the Board must look to the purpose of the mirroring policy. They assert that the purpose of mirroring is to maintain existing patterns of collective bargaining and thereby avoid confusion in future collective bargaining relationships. The applicant argues that if its combination application is successful, the mischief sought to be avoided by the mirroring policy would not arise.

25. The applicant refers to the case of *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85 at paragraphs 16 to 17, for support of its proposition that the union should be entitled to organize on a broader basis at the outset, rather than on a more fragmented basis, and then be forced to combine later.

17. In the Board's view, it made no collective bargaining or labour relations sense to sub-divide the employer social service program into little islands of separate collective bargaining, each of which might have its own collective agreement, its own separate seniority system, its own access to first contract arbitration, its own strike, and so on; and of course, each of which could conceivably be represented by a separate trade union. In the Board's view, this kind of patchwork quilt of collective bargaining units was undesirable, and could be avoided by the more comprehensive groupings sort by the union. *It made little sense to create fragmentation on the "front end" certification, then put the fragments together again, later, under section 7 of the Act.* (emphasis added)

26. The employer argues that a community of interest which is viable and stable has already been demonstrated in separate units for production and non-production employees at the full-time level, and therefore the Board should conclude that separate part-time units would also have sufficient community of interest to operate.

27. The employer notes that there has been only one interchange of employees between units in the past seven years. The employer further argues that the production department is an independent operation at least with respect to its commercial printing operation.

28. The responding party relies on the case of *Peterborough Examiner*, [1982] OLRB Rep.

March 432 at paragraph 8 for the proposition that although there has been a recent trend in the newspaper industry toward broader based units, the usual breakdown of units is still between production and all other departments.

29. The employer asserts that the Board should follow the mirroring principle as set out in the cases cited above. They emphasize the case of *Geri-care Nursing Home*, *supra*, in which the Board noted that the broader unit of employees proposed by the union clearly had a community of interest. However, the Board held that community of interest is not the only element that the Board considers in determining the appropriateness of the bargaining unit. The Board followed its mirroring policy and certified separate units, even though it found that there was a community of interest in between the broader unit applied for. The employer argues that, notwithstanding the Board's recent trend towards broader-based bargaining units, the mirroring policy should still apply with respect to established collective bargaining patterns.

30. The employer notes that as recently as 1989 the union agreed to the separation of full-time employees into production and non-production units. The union was aware of the Board's mirroring policy when they began their organizing campaign for part-time workers. The employer argues that there is no detriment to the union in applying the mirroring policy and requiring the applicant to certify the part-timers on a production/non-production basis. They are free to subsequently apply to combine the units afterwards. Finally, the responding party notes the history of the full-time organizing drive, where the union did not have sufficient support in one of the units to be automatically certified and was required to conduct a vote. The employer questioned whether the present application was framed as a single-unit application in order to avoid the necessity of a vote in one of the units.

31. The employer argues that there is a substantial onus on the person seeking to deviate from standard Board policy, (See *Vaughan Public Libraries*, [1989] OLRB Rep. Dec. 1282, at paragraph 20) and that there are no exceptional circumstances here that would justify departing from the mirroring policy.

32. The Board notes that the jurisprudence on appropriateness of bargaining units has evolved. Essentially, the question that the Board asks itself is:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer? (*The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 226 at paragraph 23).

33. Further, the Board has clearly articulated a preference for broader based bargaining units, even in the traditionally fragmented newspaper industry (See *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451 and *Hudsons Bay Company*, [1993] OLRB Rep. Oct. 1042 at paragraph 37).

34. In this case the parties have already departed from the traditionally fragmented bargaining structure and have organized on a broader base with only two units. Further, the parties have engaged in even broader bargaining than the formal structure dictates by jointly negotiating the collective agreements. The structure of the union is integrated with very little separation between members of the two full-time bargaining units.

35. In addition to developments in the case law, the legislature has indicated a preference for broader based bargaining units. In section 6 of the Act, the legislature has specifically overruled the Board's previous reluctance to allow broader based units consisting of both the full and part-time employees. Section 7 of the Act permits a trade union to apply to combine existing or proposed bargaining units.

36. In accordance with the test set out in the *Hospital for Sick Children, supra*, the Board finds that all part-time employees of the employer have a sufficient community of interest that they can bargain together on a viable basis. The best evidence of this is the experience of the full-time employees who, although they were separated into two units, did successfully bargain together. Further evidence of their ability to bargain together lies in the similarity of the terms and conditions reached in the two collective agreements bargained to date. Essentially, these employees work together for one employer with one primary purpose, the publication of The North Bay Nugget newspaper. Although there is an independent commercial printing operation, in the production department fifty per cent of the work of the department involves the publication of the newspaper.

37. Further, the Board does not foresee any serious labour relations problems arising from the one full-time unit of part-time employees.

38. Thus, but for the Board's mirroring policy, the unit proposed by the applicant is appropriate. The purpose of the Board's policy in requiring part-time units to mirror pre-existing full-time units, is to avoid the problems caused by disturbing existing collective bargaining structures. In *Ottawa General Hospital, [1982] supra* the Board stated:

8. The Board is extremely sensitive to the importance of avoiding, except for good reason, different bargaining unit configurations for full-time and part-time employees of the same classification, because of the potential for collective bargaining anomalies or distortions which that creates...

39. In *Ottawa General Hospital (Reconsideration Decision) supra*, the Board stated:

4. The Board in *Sudbury Memorial Hospital* found it appropriate instead to follow its normal practice of "mirroring" full-time and part-time bargaining units. This is a practice well known in the labour community and has the benefit of avoiding the potential for collective bargaining anomalies which may be both foreseen and unforeseen at the time of a particular application...

40. The cases applying the mirroring policy cited by the parties pre-date the legislative introduction of section 7 of the Act. Section 7 permits the Board to combine existing and proposed bargaining units of employees represented by the same bargaining agent. Where the legislature has specifically provided the means by which either party can seek to change the existing collective bargaining structure through a combination application, the mischief sought to be avoided by the mirroring policy, *may* no longer be a concern.

41. In this case for example, the applicant is seeking to combine the proposed part-time unit with the existing full-time units, thus avoiding the anomaly of different configurations for the part-time and full-time bargaining units. The mischief which the mirroring policy seeks to avoid does not arise in this case and therefore the Board will not require the part-time unit to mirror the full-time units.

42. The Board finds that a single unit of all part-time employees is an appropriate unit.

Geographic Scope

43. On this issue, the applicant argues that the mirroring policy should be followed because it would serve the very purpose for which the policy was created. The applicant requests that the geographic description cover the Province of Ontario because the full-time units are currently described in terms of the Province of Ontario.

44. The applicant acknowledges that currently there are no employees located outside of

the municipal descriptions sought by the responding party, but argues that the *potential* exists for problems to arise if further locations were opened.

45. The responding party argues that it is standard Board policy to restrict the geographic scope of the bargaining unit to the municipalities where the employer actually has employees working. (See *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226 and *Wackenhut of Canada Limited*, [1993] OLRB Rep. Apr. 393, at paragraph 9.)

46. The employer argues that there is good reason to depart from the mirroring principle with respect to the geographic scope, since the circumstances have changed since the full-time certification. The evidence establishes that although there were employees at various locations in Northern Ontario at the time of the full-time certification, currently there are only employees in North Bay and Sturgeon Falls.

47. For the same reasons set about above, the Board finds that it is not appropriate to apply the mirroring policy on this issue. The purpose of the policy, as stated previously, is to avoid the potential for confusion and collective bargaining anomalies in the future. At the present time the employer does not have employees at any locations other than North Bay and Sturgeon Falls. Although the potential exists to recreate those locations that existed previously, the potential also exists for the applicant to apply to certify those employees and combine that unit with the existing unit.

48. The Board will apply its usual municipal-wide description. Therefore, the Board finds that the appropriate geographic scope of the bargaining unit is the City of North Bay and the Town of Sturgeon Falls.

49. In light of the above conclusions, the Board finds that:

all employees of The North Bay Nugget, a Division of Southam Inc. regularly employed for not more than twenty-four hours per week and all students, in the City of North Bay and the Town of Sturgeon Falls save and except the persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3) of the *Labour Relations Act*,

constitute a unit of employees of the responding party appropriate for collective bargaining.

Clarity Note: As of the date of this application for certification, the following positions are excluded on the basis that the incumbents exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3) of the *Labour Relations Act*: Publisher, one Confidential Secretary to the Publisher, Editor, News Editor, City Editor, Sports Editor, Chief Photographer, Assistant City Editor, Entertainment/Weekend Editor, one Confidential Secretary to the Editor, Advertising Manager, Classified Advertising Manager, Retail Advertising Manager, Assistant Retail Advertising Manager, one Confidential Secretary to the Advertising Manager, Business Manager, Business Office Manager, Promotion and Circulation Sales Manager, Credit Manager, Computer Systems Manager, Circulation Manager, Production Manager, Assistant Production Manager, Press Foreman.

50. The remaining disputes between the parties on the certification application involve Harold Mochizuki, Ruth Watkins, Jamie Desrosier, and Shirley Vanderstaay. It is the position of the responding party that Harold Mochizuki is within the thirty/thirty day rule; that Ruth Watkins is an independent contractor and not an employee in the bargaining unit; that Jamie Desrosier is within the thirty/thirty day rule and that Shirley Vanderstaay is a part-time employee in the bargaining unit and not a full-time employee. The applicant takes the opposite position with respect to

each of the above employees. A Labour Relations Officer is hereby appointed to inquire into and report to the Board concerning the issues in dispute.

51. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit together with sample signatures for the employees on that list.

52. In support of its application for certification, the applicant union filed documentary evidence in the form of membership application cards. The cards are signed by each employee concerned, are dated within the six month period immediately preceding the certification application date, and are supported by a duly completed declaration verifying membership evidence.

53. The Board has determined that the applicant's right to certification cannot be affected by the ultimate outcome of the parties' disputes as to the inclusion or exclusion of the disputed individuals.

54. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on March 11, 1994, the certification application date, had applied to become members of the applicant on or before that date.

55. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act certifies the applicant as the bargaining unit agent for the bargaining unit described in paragraph 50 above.

56. A final certificate must await the final determination of the issues in dispute.

Combination Application

57. Section 7 states:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;

- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

58. The applicant argues that it has satisfied the three factors set out in section 7(3). They argue that combining the full-time units with the part-time unit would encourage inter-unit mobility and lessen some of the animosity that has recently arisen between the production unit and the non-production unit. It would also assist in breaking down an artificial barrier between the employees. Further, they argue that no serious labour relations problems would be caused by the combination.

59. The applicant notes that the case law under section 7 makes it clear that community of interest is not a factor which the applicant is required to prove in a combination application. However, in any event, the applicant asserts that all the employees of the employer do have a community of interest.

60. The employer reiterates that the onus is on the applicant to satisfy the criteria in section 7(3). The employer notes that in addition to the three factors set out in 7(3), the Board has a further discretion to take into account other factors.

61. The employer argues that the applicant has not satisfied the onus of establishing that a combination application would *facilitate* stable and viable collective bargaining. Since the present collective bargaining structure between the parties is working, there is nothing that could facilitate the situation. There have been no strikes and few grievances and the parties have successfully jointly bargained two collective agreements. The employer notes that in *Mississauga Hydro Electric Commission*, [1993] OLRB Rep. June 523, although the Board suggested that there need be no problems in order to facilitate the situation, *on the facts* the Board did find that there were “quite persistent irritants” that the combination application would overcome. The employer argues that this is *not* the case here.

62. The employer notes that combining units would *always* reduce fragmentation, but suggests that the requirement in subsection 7(3)(b) requires more than merely reducing fragmentation. Rather, they argue that the applicant is obliged to prove that the combination would reduce the *problems* caused by fragmentation. In *Mississauga Hydro Electric Commission*, *supra*, at paragraphs 7, 8 and 15 and in *The Hudsons Bay Company*, [1993] OLRB Rep. Oct. 1042 at pages 1046 to 1048, the Board set out the problems caused by fragmentation, including work stoppages, restricted employee mobility, jurisdictional disputes and increased administrative costs. The employer argues that in this case there was no evidence that the separation of production and non-production employees has caused any of those problems. Therefore, combining units would not reduce any problems caused by fragmentation.

63. The responding party argues that serious labour relations problems would flow from the increase in the union’s bargaining strength. Specifically, the employer argues that combining the four units or indeed combining any units between production and non-production employees, would permit the non-production employees to close down the newspaper *and* the commercial printing operation, regardless of the wishes of the production employees.

64. The employer suggests that as only thirty per cent of the membership showed up for the meeting to vote on the combination application, there was insufficient indication that the employees wished to combine the units and that combining them in the face of a lack of employee support would cause serious labour relations problems.

65. With respect to the discretionary factors, the employer asks the Board to take into account the particular industry involved. The employer points to the fragmented nature of the printing industry whose history is set out in *Peterborough Examiner* [1982] OLRB Rep. March 432 and *Brantford Expositor* [1988] OLRB Rep. July 653. At the current time there is no set pattern of organizing in the printing industry. There are some newspapers in which there are all employee units. There are some newspapers in which there is a separation between the production employees and all other employees and there are newspapers in which there are further separations between editorial, advertising, and circulation departments.

66. Finally, the employer argued that the lack of community of interest between the production and non-production employees and the independent nature of the commercial printing operation are factors which should cause the Board to exercise its discretion to refuse the combination order.

67. The Board rejects the employer's arguments. The Board has set a low threshold with respect to the requirement that the combination "facilitate viable and stable bargaining". In *Mississauga Hydro Electric Commission, supra*, [1993] OLRB Rep. June 523, the Board stated that there is no need for the applicant to prove some existing problem in order to satisfy this subsection:

23. We find it instructive as well that the language of section 7(3) does not suggest that the combination of units is to be resorted to only as a remedy for a problem of some kind...

24. ... This language suggests that it is not necessary to establish an existing problem to succeed in an application, but only that the combined unit might make viable and stable bargaining easier, for example.

68. See also *The Hudson Bay Company, supra*, where the Board stated:

23. In this case, the company argued that the parties had a viable and stable relationship, that there had been no strikes or lockouts in its eight year history, and that the Board should not fix what was not broken. In counsel's view, an applicant should have to demonstrate some significant problem with the existing arrangement, or a compelling reason for combination. The Board addressed a similar argument in *Mississauga Hydro Electric Commission, supra* ... We find these comments equally pertinent to the case before us. Moreover, the proposition that an applicant should have to establish some problem with the existing situation before the Board will combine units is even less persuasive in a context where the parties have themselves initiated a significant degree of combination in practical terms.

69. The Board accepts this jurisprudence which suggests that an applicant need not prove problems with the existing collective bargaining relationship in order to establish that combining units "would facilitate" the situation. It is true that on the facts of this case the parties have had an extremely successful collective bargaining relationship. They have successfully negotiated two collective agreements and the union has not had to obtain a strike vote from its members. Nonetheless, the Board finds that formalizing the parties' informal arrangements would facilitate the process of joint collective bargaining. Further, although the evidence on this point was minor, there was some evidence of recent tension between production unit employees and non-production unit employees involving the transfer of work from one department to the other. The Board finds that this tension will likely be reduced by an order combining the two units. The Board also believes that combining the units will help to lower the artificial barrier between the units which may have contributed to this tension between the two units. In *The Hydro Electric Commission of the City of Ottawa*, [1994] OLRB Rep. April 516, the Board stated:

8. While it is true that the parties in this case have already achieved a substantial degree of similarity in the terms and conditions of employment between the two units and have made provi-

sion for such matters as inter-unit mobility, the Board is of the view that these matters can only be strengthened by combining the two units. In particular, the Board knows that as a result of the most recent round of collective bargaining, the two units now have different levels of benefits in their collective agreements. This is a situation which neither the employer or the trade union considers desirable, but which was a product of the bifurcated bargaining structure.

9. The Board is also of the view that combining the two units will help to lower the “artificial” barrier between the two units which, to some extent, may inhibit inter-unit mobility and which, from time to time, has contributed to animosity between the two units. A *combination* order will also lessen the likelihood of work stoppages by eliminating the possibility that the outside unit will feel compelled to reject as inadequate any agreement earlier reached by the inside unit. Combining the two units will also eliminate some duplication of effort and costs associated with separate collective bargaining for both parties.

70. There is also a low threshold with respect to the requirement that combination “reduce fragmentation of bargaining units”. The Board stated in *Mississauga Hydro Electric Commission*, *supra* at paragraph 24:

24. ... We note as well that section 7(3)(b) refers only to fragmentation, and not undue fragmentation. This also implies a fairly low threshold for an applicant.

71. We do not accept the argument that “reducing fragmentation” requires the applicant to show that the problems caused by fragmentation would be reduced. In our view this is simply another variation of the “if it ain’t broke don’t fix it” argument which has previously been rejected by the Board. In any event, the Board does not accept that the problems associated with fragmentation enumerated by the employer, namely, work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs, are the *only* problems caused by fragmentation. Loss of solidarity between employees in separate bargaining units is also a factor, as is increased “tension within and between bargaining units” (see *Mississauga Hydro Electric Commission* at paragraph 10). As discussed above, although the situation in this case is not grave, there is evidence of some animosity between employees in the separate units. It appears to the Board that fragmentation would be reduced by combining the two full-time units with the one part-time unit.

72. The Board notes that there is a statutory *preference* for combining part-time and full-time units. See *Kingston Access Bus*, [1993] OLRB Rep. July 610:

7. There is no doubt that the combined bargaining unit is one that the Act recognizes as appropriate for collective bargaining. Section 6(2.1) of the Act states:

(2.1) A bargaining unit consisting of full-time employees and part-time employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.

8. We accept therefore, as our initial proposition, that the combined bargaining unit is the *preferred* bargaining unit for the purposes of the Act. To the extent that the Legislature has expressed a preference for such a bargaining unit, we are satisfied that it would “facilitate viable and stable collective bargaining” and “reduce fragmentation of bargaining units” to direct the combination.

73. Finally, it does not appear to the Board that any serious labour relations problems would result from the combination order. The main arguments put forward by the employer, an increase in the bargaining strength of the union and a lack of community of interest between the members, are not persuasive. First, a shift in bargaining power, standing alone, is not the type of serious labour relations problems contemplated by this section (see *The Hudsons Bay Company*, *supra* at paragraph 47 and *Hydro Electric Commission of the City of Ottawa*, *supra* at paragraph 10). The possibility that the employer’s commercial printing operation would also be shut down

along with the newspaper in the event of a strike is a possibility currently faced by the employer should both units, who bargain together, decide to go on strike. The Board does not view this as a serious labour relation problem.

74. Second, we accept the Board jurisprudence which suggests that community of interest is generally not a factor to be considered by the Board except in cases where the “interest of employees are so strongly discordant” as to create serious labour relations problems (*Mississauga Hydro Electric Commission, supra* at paragraph 18). We do not find that to be the case here.

75. Finally, the Board declines to exercise its discretion to refuse the combination order as a result of the patchwork of collective bargaining relationships present in the newspaper industry. Although there is no set pattern for organizing in the newspaper industry, there has been a recent trend towards broader based units, and there are newspapers where all employees are represented by a single trade union.

76. In conclusion, we direct that the two full-time units be combined with the interim certified part-time unit. We remain seized with regard to any further remedial relief.

1016-94-U The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW Canada) and its Local 112, Applicant v. Toromont, a division of **Toromont Industries Ltd.**, Responding Party

Ratification and Strike Votes - Reconsideration - Strike - Strike Replacement Workers - Unfair Labour Practice - Union making application in respect of alleged unlawful use replacement workers during strike - Issue arising as to whether section 73.1 of the Act applying - Board not satisfied that strike vote conducted by union in accordance with section 74(4) to (6) - Unfair labour practice complaint and reconsideration application dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members R. W. Pirrie and P. V. Grasso.

APPEARANCES: Frank Luce, Fizuc Karim and John Amato for the applicant; David Cowling, John Fenton and Jayson Rider for the responding party.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER R. W. PIRRIE;
August 9, 1994

1. The name of the responding employer is amended to “Toromont, a division of Toromont Industries Ltd.”.

2. This is an application in which the applicant trade union alleges that the responding employer (“Toromont”) violated section 73.1 of the *Labour Relations Act* by using replacement workers during the course of a lawful strike.

3. Upon considering the evidence and representations of the parties at the hearing held on June 27th and 28th, 1994, the majority of the Board, Board Member Grasso dissenting, ruled, orally at the hearing on June 28, 1994, that it was not satisfied that the strike vote held by the trade union in this case was conducted in accordance with the provisions of section 74(4) of the *Labour*

Relations Act, and that the strike in which the trade union is engaged, although lawful, is therefore not a strike to which section 73.1 applies. The Board further ruled that this application must therefore be dismissed.

4. Section 73.1 of the *Labour Relations Act* provides that:

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; (“personne”)

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. (“lieu d’exploitation à l’égard duquel la grève ou le lock-out a lieu”)

(2) This section applies during any lock-out of employees by an employer or *during a lawful strike that is authorized in the following way:*

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.
- 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1(3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

(emphasis added)

5. In this case, the following was common ground.

- (a) The trade union was certified as the exclusive bargaining agent of certain employees of Crothers Limited in 1970.
- (b) The most recent collective agreement between the trade union and Crothers Limited was effective from February 15, 1991 to February 7, 1994.
- (c) Toromont purchased the assets of Crothers Limited in August, 1993 and is, for labour relations purposes, a successor employer of Crothers Limited.
- (d) Toromont is the exclusive dealer for Caterpillar products in Eastern Ontario. It has several branches, the largest of which is located in Concord (the Toronto branch), which is also the company headquar-

ters. The (now expired) collective agreement covers the warehouse and service employees at the Toronto branch.

- (e) The applicant gave notice to bargain on November 12, 1993.
- (f) The applicant applied for conciliation on January 24, 1994. A Conciliation Officer was appointed on February 2, 1994.
- (g) The Minister issued a "No Board" report on February 14, 1994.
- (h) On February 23, 1994, the applicant gave notice to the company in writing that a strike would begin on March 7, 1994.
- (i) A lawful strike began on March 7, 1994, and was continuing as of the date of the hearing herein.

6. The trade union also pleaded that it "... held a strike vote on February 6, 1994, in accordance with s. 74 of the Act, and in excess of 60% of those voting authorized a strike." Toromont pleaded that it "has no knowledge of this material fact."

7. When the hearing convened, Toromont moved that the trade union be required to proceed first and establish that all the statutory preconditions to the application of section 73.1 have been met; namely, that the strike vote which had been held had been conducted in accordance with subsections 74(4)-(6) and that at least sixty per cent of those voting had authorized the strike. Counsel said that this would also give him an opportunity to review the additional particulars and documents which had been delivered by the trade union minutes before the hearing had begun.

8. The trade union opposed this motion. Counsel submitted that section 73.1 clearly provides that the burden of proof in an application like this one is on the employer, and that the Board ought not bifurcate the proceedings, and should not deal with technicalities, but rather should proceed and deal with the merits of the application as a whole. Counsel argued that Toromont should not be allowed to even pursue any issue regarding the conduct and results of the strike vote because it had neither made nor particularized any allegation in that respect. Counsel also said that the Board should be "astounded" at Toromont's position in that respect because in other proceedings, initiated by the employer, it had asserted that this strike was one within the meaning of section 73.1, which should be taken as an admission against Toromont's interest in this case that all the preconditions had been met.

9. By majority decision, Board Member Grasso dissenting, the Board ruled (orally) that it would first inquire into whether the preconditions set out in section 73.1(2) had been met, and that the trade union should proceed first in that respect.

10. The delivery by the trade union of further particulars and documents virtually at the hearing room door did not factor into the Board's determination in this respect. Further, the "other proceedings" referred to by the trade union have apparently been adjourned *sine die* without any determination of any issue. The Board did not consider that a position adopted by a party in other proceedings, which may never go any further, was relevant to its determination of this motion.

11. Subsection 73.1(2) specifically states that section 73.1 applies during a lawful strike that is authorized by a strike vote conducted in accordance with subsections 74(4)-(6), after the notice to bargain was given or bargaining had begun and in which sixty per cent or more of those voting

authorized the strike. A strike vote held in accordance with subsections 74(4)-(6) is mandatory. The section 73.1 prohibition against the use of replacement workers does not apply to a lawful strike which has not been authorized by such a strike vote. This is the only provision in the Act which *requires* a trade union to hold an internal vote. The requirements of subsection 73.1(2) are not mere “technicalities”. Nor are they hurdles constructed by the Board. They are statutory preconditions, imposed by the Legislature, which must be met before the prohibitions against the use of replacement workers apply. It is the statute itself which makes the authorization of the lawful strike an issue. It is not necessary for an employer to do so. Indeed, an employer will usually have little or no information with respect to how a strike vote has been conducted, and the nature of a strike situation as such that it would be counterproductive, from a labour relations perspective, to require an employer to conduct the sort of investigation which would be necessary for an employer to inform itself in that respect. Consequently, if an employer challenges a trade union’s right to invoke section 73.1 on the basis that the requirements of subsection 73.1(2) have not been met, the trade union bringing an application under section 73.1 must establish that section 73.1 applies to the strike in which it is engaged, by establishing that these statutory preconditions have been met.

12. Subsection 73.1(9) of the Act places the burden of proof that an employer has not acted contrary to section 73.1 on that employer. But this does not mean that the evidentiary onus for each and every issue in a s.73.1 application is necessarily on the employer as well. Where a responding employer challenges the authorization of the strike in which the applicant trade union is engaged, it may well make practical sense, as it did in this case, to have the trade union call its evidence on that issue first, particularly since the trade union will generally be the party which is in the best position to do so. This does not mean that a bifurcated hearing is necessary or appropriate in every case. How a particular application should proceed is something which can only be determined in the context of the case which the parties place before the Board. Further, although a trade may not be *required* to plead particulars of the strike vote upon which it relies, it may be wise for it to do so in order to avoid delays which might result if it does not.

13. In the course of the cross-examination of Fizul Karim, the trade union’s plant Chairperson and first and main witness, counsel for the trade union objected to certain questions which seemed to suggest that Toromont had more information about what had gone on at the strike vote than it had let on. The trade union argued that Toromont should have particularized the facts suggested by its questions, and that it was obvious that Toromont had misled the Board by suggesting that it had no information about the strike vote which should cause the Board to reconsider its decision to require the trade union to first establish that the conditions in section 73.1(2) had been met, and that the Board should start the hearing all over again.

14. By majority decision, Board Member Grasso again dissenting, the Board ruled, orally, that the cross-examination with respect of the circumstances and conduct of the strike vote was proper, and that it would not reconsider its previous ruling. The Board accepted the explanation of counsel for Toromont that he had obtained some information regarding the strike vote over the lunch break and was satisfied that, in the circumstances, the facts being suggested to the witness need not have been particularized. The Board also observed that the evidence which Toromont was seeking to elicit in cross-examination was the kind of evidence which the Board expected to have put before it on the issue.

15. On the merits, the trade union argued that no employee has complained about the strike vote because there was nothing wrong with the way it was conducted. Counsel observed that section 74 has been in the *Labour Relations Act* for over twenty years and submitted that it should be given the same interpretation now as it was prior to the Bill 40 amendments to the Act of which section 73.1 was one. In that respect, counsel argued that section 74 requires nothing more than a

ballot which contains nothing on it which might identify the person who cast it. Counsel submitted that the mere possibility that some employees observed how others voted should not negate the validity of the vote, having regard to the manner in which trade unions typically conduct such votes, and further that a concept of the secret ballot is a flexible one which it is appropriate to adapt to the circumstances. The trade union submitted that the evidence showed that most employees did not care if others knew how they were marking their ballots and that the vote results demonstrate strong support for the strike.

16. The evidence before the Board reveals that the trade union held a meeting of the bargaining unit at its hall in Downsview on February 6, 1994, one day before the collective agreement actually expired, for the purpose of discussing the collective bargaining negotiations and holding a strike vote. To that end, the trade union posted notices on its bulletin boards at the facilities in which the bargaining unit employees are employed as follows:

NOTICE

LOCAL 112 C.A.W. TOROMONT

SPECIAL MEETING

TO ALL MEMBERS OF C.A.W. 112 UNIT - A meeting will be held on

Sunday, February 6, 1994

The Union Hall

at 10:00 a.m.

This meeting is to inform the membership of what has transpired between your Bargaining Committee and the representatives of the Company with regard to the union proposals.

Your attendance at this meeting is very important as a strike vote will be called.

IN SOLIDARITY.

John Kennedy	President
Fizul Karim	Plant Chairperson
Rick Bobins	Bargaining Committee
Karl Behrmann	Bargaining Committee
Gord Langley	Bargaining Committee
Herb Niepalla	Bargaining Committee

Although the extent of its efforts is unclear, the trade union also appears to have made some attempt to bring the meeting to the attention of bargaining unit employees who were away from work and might not see the notices. Mr. Karim also testified that he “thought” that some “pre-balloting” arrangement were made, but we were unable to conclude on the evidence before the Board that that was the case. (In any event, there was no evidence that any ballots were either distributed or cast prior to the February 6th meeting.)

17. The meeting proceeded as scheduled. 110 out of the 145 bargaining unit employees attended. The entrance through which everyone who attended the meeting had to pass was controlled by Tom McNally, the trade union’s elections Chairperson, with the assistance of a “sergeant-at-arms”. Mr. McNally testified that he personally recognized each person who had entered the hall as a bargaining unit employee. In addition, each person was required to “sign in”, and place their employee “clock number” beside their signature. No one was refused admission.

18. The meeting was held in a large meeting room capable of holding approximately 300 people. The other rooms in the building occupied by the trade union, which consist of four offices, a smaller boardroom and a computer room, were locked up and not available for use at the meeting. Mr. Karim conceded that arrangements could have been made to make one or more of these other rooms available.

19. There is a stage at one end of the room in which the meeting was held. A table was set up on that stage. At this table sat five members of the union's bargaining committee, the Local President, and a representative of the National Union. On the floor facing the stage, were rows of ten to fifteen chairs with an aisle on each side. There were no arm rests on the chairs. A large round table was set up off to one side of the stage. The top of this table was level with the stage floor. A ballot box and a number of pens and pencils were placed on this table.

20. The Local President called the meeting to order at approximately 10:15 a.m. After setting out the rules of order for the meeting, there was a review of the collective bargaining situation. Mr. Karim testified that after some "debate", the bargaining committee recommended that strike action be taken and a strike vote was called. There is no evidence of what the debate consisted of.

21. Mr. McNally then handed out ballots in the following form:

LOCAL 112 CAW

BALLOT

ARE YOU IN FAVOUR
OF STRIKE ACTION

YES

IN ORDER TO SUPPORT
OUR DEMANDS FOR A
JUST AND EQUITABLE
CONTRACT SETTLEMENT

NO

(MARK BALLOT WITH AN X)

He did so by walking up and down the rows of chairs and handing a single ballot to each bargaining unit employee present. The only instruction given to employees was that they were to mark their ballot and deposit it in the ballot box on the table by the stage. There was no instruction or indication given that the vote was to be by secret ballot.

22. The evidence before the Board reveals that many employees marked their ballots at their seats using a pen or pencil of their own, or one which they borrowed from someone sitting near them. These employees then walked up and placed their ballots into the ballot box. Other employees went up to the ballot box, marked their ballots at the table the ballot box was on and placed their ballot in the box.

23. The bargaining committee, the Local President and International Representative apparently remained seated at the stage table, overlooking the ballot box table, throughout most or all of the balloting. Mr. Karim testified that he watched the ballot box and was sure that no one had placed more than one ballot into the box. He said that other people seated with him also watched the ballot box. Three or four of them sat closer to the ballot box than Mr. Karim.

24. Employees who marked their ballots at the ballot box table did not necessarily do so individually. At times three, four, or five employees marked their ballots at or about the same time, while small groups of other employees stood nearby chatting about the vote.

25. The evidence before the Board reveals not only that it is probable that the manner in which ballots marked by employees at their seats was observed by others, but that at least one bargaining unit employee, who testified before the Board, actually saw how an employee beside him marked his ballot. It is also clear that employees who marked their ballots at the ballot box table did so under the scrutiny of the union's bargaining committee, Local President and International Representative, and in circumstances where other employees had the opportunity to observe how they marked their ballots as well.

26. All 110 employees cast ballots. 97 ballots were marked in favour of a strike, 12 were marked against the strike, and 1 ballot was spoiled.

27. Everyone who testified said that this strike vote was conducted in the same way as numerous previous strike or ratification votes. In addition, there is no evidence that any bargaining unit employee has complained to anyone about the manner in which the vote was conducted.

28. Subsections 74(4)-(6) of the *Labour Relations Act* provide that:

74.- (4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

29. We were satisfied that the notice of the strike vote given by the trade union gave bargaining unit employees adequate and sufficient notice of the strike vote. Nor was there anything in the setting or atmosphere of the meeting itself which gave us cause for concern. It is unreasonable to suggest that employees are entitled to be entirely free of pressure in such situations. Pressure is a part of everyday life, and all decisions of any significance are made in the context of various and sometimes extreme pressures. This is especially true of labour relations situations, particularly when strike action is being contemplated. Decisions relating to strike actions are generally made in highly charged circumstances, and no one expects a trade union meeting to be conducted in "tea party" or laboratory conditions.

30. However, the *Labour Relations Act* does require that strike votes "... shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed". Although it need not have done so, the Legislature felt it necessary to emphasize that strikes to which the replacement worker provisions of section 73.1 apply must be authorized by a strike vote conducted in this manner by specifically referring to subsections 74(4)-(6) in section 73.1(2).

31. It might be argued that the Legislature could have said that a strike vote must be by secret ballot and that because it chose instead to say that it "shall be by ballots cast in such a manner that the persons expressing their choice cannot be identified with the choice expressed", it intended something other and perhaps less than a secret ballot would be sufficient. In *RCA Limited*, [1981] OLRB Rep. Aug. 1159, the Board reviewed the history of what is now section 74(4), and the policy considerations underlying it, and the issue to which it is addressed:

• • •

26. The section touches in some measure the long debated question of the extent to which there should be public regulation of the affairs of trade unions. As a representative organization a trade union is in a unique situation. A political party or any voluntary association can, and usually does, restrict to its members the right to participate in meetings, to vote and to otherwise influence policy. Originally that is how unions functioned. Unions have, however, become more regulated by existing labour relations statutes in the conduct of their internal affairs. (See, generally, Wilson, *Political Organizations*, New York, 1973 pp. 119-20.) In part because of the considerable power a union can exert over the lives of the employees it represents, notably through control of the grievance process, closed shop agreements and the hiring hall, the Legislature, like the law making bodies of other jurisdictions, has gradually developed safeguards in a number of general practices and procedures used by unions in the representation of employees. The statutory duty of fair representation, requirements for the disclosure of financial statements, the regulation of union trusteeships and the requirement of secrecy in strike and ratification votes are examples of those developments as reflected in the Act today.

27. In the United States breaches of trust and serious instances of corruption, albeit in a small minority of unions, were brought to public attention by the report of the McLellan Committee in 1957. In 1959 the United States Congress responded by the passage of *The Landrum-Griffin Act* requiring, among other things, that union members be guaranteed the right to vote, by secret ballot, in union elections at least every three years. Citing past abuses in its preamble, the Act also established a bill of rights for union members, protecting among other things, the freedom of speech and assembly of union members and providing safeguards against disciplinary actions without due process. (See, generally, Bok and Dunlop, *Labor and the American Community*, New York, 1970, pp. 64-91.)

28. During the same period in Britain public concern was aroused by a series of prominent court cases involving union electoral malpractices. (See C. H. Rolph, *All Those in Favour? The E.T.U. Trial*, (London 1962)). The U.K. *Royal Commission on Trade Unions and Employers' Associations 1965-68* (The Donovan Report), (June 1968) articulated the need for greater public accountability in the affairs of unions, commenting (at para. 1069), "Because of the connection between union membership and members' livelihoods trade unions cannot be regarded simply as voluntary clubs from the members' point of view." The Commission made extensive recommendations including the establishment of a public authority to review complaints of electoral malpractice in union elections and to provide redress from internal union procedures that violate standards of natural justice.

29. The need for special statutory protections for the individual rights of union members was a natural consequence of the limitations of the common law. Traditionally the common law courts did not embrace the prospect of litigation over internal union matters. (See Summers, *Legal Limitations on Union Discipline* (1950), 64 *Havard Law Rev.* 1049 at p. 1051.) Gradually, however, as union membership became a more critical commodity, through theories grounded in contract, tort and the prerogative writs, courts in both the United Kingdom and Canada fashioned judicial remedies for individuals aggrieved by the internal actions of their union (e.g. *Lee v. Showmen's Guild of Great Britain*, [1952] 1 A11 E.R. 1175 (CA); *Orchard v. Tunney*, [1957] S.C.R. 436; *Stern v. Seafarer's International Union of North America*, [1961] S.C.R. 682; and see, generally, E.E. Palmer, *Task Force on Labour Relations* (Study No. 11), (The Woods Report) Queen's Printer, Ottawa, 1970, at pp. 313-26.) There appear to be no reported cases, however, of individual actions in the courts to enforce secret ballot strike or ratification votes.

30. Recourse to the courts by individual union members was ultimately perceived as too costly and too slow to redress the grievances of rank and file workers (see e.g. *The Donovan Report*, para. 644). It became increasingly felt that the common law doctrines were neither sufficiently clear nor sufficiently responsive to labour relations realities, and that special legislation would be more appropriate. In this regard the *Task Force on Labour Relations* (Queen's Printer, Ottawa, 1968), (The Woods Report) made a number of recommendations (see pp. 149-55; see also *Task Force on Labour Relations*, (Study No. 11), at pp. 71-107, 137-57). Following the view expressed in *The Donovan Report*, *The Woods Report* concluded that in light of the public interest in industrial relations stability generally and the extensive control exerted by trade unions

over the rights of individual members, a certain amount of public accountability and regulation of internal union affairs was necessary. At p. 149 the Report commented:

Today, many interests of trade unions are vested in the legal framework of collective bargaining, including monopoly bargaining rights. They can no longer claim the status of private associations whose internal affairs are solely their concern. They have become quasi-public bodies, if not public institutions, and the public has acquired an interest in their internal operations.

The report specifically recommended that although *strike votes and ratification votes should not be mandatory, legislation should provide that when such votes are held they must be by a form of ballot that preserves secrecy*. The specific observations and recommendations of the *Task Force Report* are instructive for what they reveal of the policy considerations underlying legislation like section [74](4) of the Act. They are more closely examined below.

31. A number of jurisdictions, including Canada, had already legislated in the area of union voting procedures before the McLellan and Donovan inquiries in the U.S. and the U.K. or the Woods Report in Canada. In New Zealand, for example, section 191(1) of *The Industrial Conciliation and Arbitration Act*, 1954, first enacted in 1947, provided: "...no...strike shall take place until the question whether the strike shall take place has been submitted to a secret ballot of those members of the union who would become parties to the strike...". That provision was coincident in time with *The Taft Hartley Act (Labour Management Relations Act - 1947)* in the U.S. which allows for a government conducted strike vote under certain conditions in strikes that are deemed to constitute a national emergency.

32. The first laws governing the conduct of strike votes in Canada and the U.S. appear to have come in the form of emergency wartime legislation during World War II. *Order in Council P.C. 7307* (in force from September 1941 to September 1944) authorized the Minister, if he deemed that a work stoppage would hinder war production, to order a supervised strike vote before a union could lawfully strike in any undertaking within the constitutional jurisdiction of the Parliament of Canada. In the U.S. *The Smith - Conally Act (War Labour Disputes Act)* (57 Stat. 163, 78th Congress U.S.A.) enacted similar provisions and remained in force until December 28, 1945, (see, Anton, *Government Supervised Strike Votes*, (C.C.H. Canadian Ltd. pp. 10-130).

33. In Canada strike vote legislation was enacted in the post war period in two provinces. *The Alberta Labour Act*, 1945 provided that as a precondition to a lawful strike a strike vote must first be conducted under the supervision of the Alberta Board of Industrial Relations. With certain amendments that requirement remains in effect today. (See, S.A. (1980), Chapter 72., s. 87 and s. 90. A similar provision was enacted in British Columbia. *The Industrial Conciliation and Arbitration Act*, S.B.C. 1947, c. 44, s. 75(1) required a secret ballot vote supervised by the B.C. Labour Relations Board as a precondition to a strike. In 1954 British Columbia's revised law, *The Labour Relations Act*, S.B.C. 1954, c. 17, s. 50(1) continued the requirement of a secret ballot vote before a strike, although under the new Act government supervision was only at the request of one of the parties. That provision remains in effect. (See s. 81(1) of the Act.)

34. Section [74](4) of *The Ontario Labour Relations Act* as it presently exists originated as section 25(3) of *The Labour Relations Amendment Act*, 1960, S.O. 1960 c. 54. It then provided:

A strike vote taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

It was subsequently amended in 1970, after *The Woods Report*, to also require *secret balloting* in any vote to ratify a proposed collective agreement. Consistent with the recommendation of *The Woods Report* the section does not require a union to take a ratification vote.

35. The requirement of section [74](4) and its underlying purpose, is to be distinguished from the amendment of the Act in 1975 (S.O. 1975, c. 76, s. 7) adding section 34(d) whereby the Minister may, after the commencement of a strike or lock out order that a ratification vote be held where he is of the opinion that it is in the public interest to do so. It is also to be distinguished from the recent amendment (S.O. 1980, c. 34, s. 1) adding section 34e which gives an employer, other than in the construction industry, the right to have one supervised ratification vote among

its employees on its last offer, before or after a strike has commenced, (see *Wilson Automotive*, [1980] OLRB Rep. Sept. 1337 and *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583.)

36. In interpreting section [74](4) it is important to bear in mind its history and its limited purpose. There are a number of provisions in the Act respecting voting by employees, including representation votes in certifications, (ss. 7, 8), terminations (ss. 49, 51, 52), votes to resolve conflicting bargaining rights on the sale of a business (s. 55(8) and the strike and ratification votes provided by sections 34(d) and 34(e). Section [74](4) is the only section in the Act in respect of votes conducted by a trade union. That reflects a clear legislative intention, consistent with the recommendations of the Royal Commissions reviewed above, to avoid undue interference in internal trade union matters.

37. Two predominant purposes appear to underlie the section: the promotion of industrial relations peace by reducing the likelihood of disputes and strikes that do not have the voluntary support of employees, and the *protection of the ability of employees to exercise their privilege to vote on a strike or a contract ratification free from coercion or undue influence caused by any undue concern that their choice on a ballot will be known to others.*

38. There has been less than full acceptance of the belief that secret ballot strike votes and ratification votes will reduce the incidence of strikes on the theory that rank and file employees are less prone to want a strike than their union leaders. The *Donovan Report* rejected that view in the face of empirical evidence, some of it emanating from the experience in Alberta and British Columbia, supporting the opposite conclusion. (see, *the Donovan Report*, para. 428) and see also Anton, *supra*, pp. 144-52; Bok and Dunlop *supra* at p. 78). There is considerable evidence to suggest that union leaders are generally more prone to seek stability and settlements and avoid confrontation than the rank and file employees that they represent. Partly on that basis the *Donovan Report*, like the *Woods Report* following it, declined to recommend that ratification votes and strike votes be mandatory. Both commissions accepted that to the extent that strike votes conduce to strike mandates, brinkmanship is promoted by mandatory strike [sic] vote legislation. In their view such legislation too often forces a situation in which union negotiators have less freedom to move, thereby increasing rather than reducing the likelihood of disagreement between unions and management in bargaining. Under *The Labour Relations Act*, therefore, the decision whether a ratification vote will be held and the timing of such a vote is left entirely in the discretion of unions, save in the exceptional circumstances of sections 34d and 34e.

39. The prevailing purpose of section [74](4) must be seen as providing a minimum of protection to employees to insure that the voting rights which they exercise in ratification and strike votes are unfettered by coercion, intimidation and undue influence. Strike and ratification votes can, as in the instant case, be hotly contested within a bargaining unit. In light of the history canvassed above, there can be little doubt that section 63(4) was specifically designed to eliminate the mischief of voice votes or votes by an open show of hands at union meetings called to resolve issues of strike or ratification. While abuses were not frequent, (see, *Woods Report*, Study No. 11, *supra*, pp. 149-150; Anton *supra*, pp. 88-90), the section emphasizes the *paramount interest in all cases of protecting the individual's right to vote secretly.*

40. The wording of the section is deliberately general. Section [74](4) speaks of ballots, but does not require that they be cast at a meeting or that a ballot box be used. That is in keeping with the realities of collective bargaining. In some bargaining units ratification votes may have to be conducted over a period of days covering a number of locations or a wide area. Sometimes a union will require the expedient of mailed ballots. The omission from section [74](4) of any detailed rules on balloting procedures is a recognition that beyond eliminating the mischief described above, it is undesirable to unduly restrict a union's latitude to conduct its own affairs. It is also unrealistic to expect union meetings to be models of parliamentary democracy. The section is therefore limited to *requiring a union to take adequate steps to shelter employees from the abuses of open voting.*

41. In its present form section [74](4) is responsive to a number of the concerns expressed in the report of Woods Task Force which, at p. 153, made the following observations and recommendations:

There is no question that employers, unions, employees and the government as custodian of the public interest all have an interest in the issue of ratification votes. Nevertheless, in our view the question of ratification votes is primarily the business of unions. The problem presented by the tactical element is not one that is amenable to legislation. Were it so, we would have given more weight to the view that ratification votes should be banned. The element that is susceptible to control is the form that the ratification vote takes. The public interest in the system of collective bargaining justifies regulation to ensure a vote that fairly represents the judgement of the constituents. We therefore recommend that where a ratification vote is taken, it be by secret ballot and that the constituents have maximum access to the ballot.

To these ends we recommend that the ballot be taken at the entrance to the work place or work places or by mail, *that steps be taken to ensure the secrecy of the ballot*, and that the employer's right to put his views to the electorate be preserved. Knowledgeable mediators and conciliators can play a useful function in advising the parties on the timing and form of ratification votes.

42. The Act leaves in the hands of a union the decision whether to hold a ratification vote internally. It does not establish any detailed rules to be followed on the taking of a vote save that it be by a form of secret ballot. As section [74](4) is framed, subject to the condition of secrecy, there is a necessary allowance for considerable flexibility in the time, place and method by which a ballot is taken. Section [74](4) is clearly worded to allow employees maximal access to the voting process. In our view it should not be construed as precluding multilocation balloting, balloting outside of a union meeting or balloting by mail or some other form of conveyance where that is appropriate. The word "manner" in the section is to be given a broad and liberal construction consistent with the intention of the section.

(emphasis added)

The Board then went on to conclude that:

...

53. The complainant argues that the mere possibility of identification offends the section. We cannot agree. To accept that argument is to reduce the section to an unduly narrow standard. Abuse is possible in any election no matter what precautions are taken. Having regard to the purpose of the section and the context in which it applies the more appropriate approach is to examine *whether the manner in which a ballot is conducted gives rise to a perception among reasonable employees of a real likelihood that individual choices will be identified, so as to cause the kind of apprehension that can materially inhibit the expression of the true wishes of the individuals in the bargaining unit*. That question can only be answered in individual cases by closely examining all of the circumstances.

54. We are satisfied that in this case the evidence does not disclose a violation of section [74](4) of the Act. *The section requires a secret ballot vote*. That is what the union conducted, consistent with requirements of its own constitution. Specially printed ballots were used. Instructions were given that they should be folded, obviously for the purpose of protecting secrecy. Steps were taken to insure voters a reasonable measure of privacy as they marked their ballots. The ballots were handed out, collected and counted exclusively by three employees whose trust and integrity are unquestioned. From the time the vote was called until the result of the vote was certified in writing by the scrutineers no union officer had any contact with the ballots. Save in the instance of one employee who made a deliberate show of spoiling his ballot, there is no evidence to suggest that the choice on any employee's ballot was seen or that there was any reasonable likelihood that it would be seen. The fact that a less honourable person than Mr. Todd could, by some deliberate act of bad faith, has violated his trust and identified the choice of some employees, does not invalidate what in fact occurred.

55. Counsel for the company stressed that the closeness of the vote makes this a hard case. Clearly the closeness of a given vote cannot affect our interpretation of section [74](4) and the standard to be applied. Being satisfied that the standard required of section [74](4) has been met, all that we can conclude from the evidence of the result of the vote is that on the issue of

ratification the employees were closely divided. We agree with counsel for the company that the outcome of a vote in a given complaint under section [74](4) might have some bearing on the exercise of the Board's remedial discretion under section [91] of the Act. That discretion comes into play however, only once a violation of the section has been established. In this case it has not.

56. For the foregoing reasons the complaint is dismissed.

(emphasis added)

32. The Board in *RCA Limited*, correctly in our view, saw section 74(4) as a legislative attempt to alleviate the pressures on employees faced with making a choice in strike or ratification situations by requiring that employees be given an opportunity to vote secretly. That is, section 74(4) is a legislative requirement that strike and ratification vote be by secret ballot.

33. Accordingly, the onus is on a trade union which holds a strike or ratification vote to structure that vote in such a way which provides employees with an opportunity to mark and cast their ballots in secret. It is not appropriate that a strike or ratification vote be structured in a way which puts the onus on employees to take steps to ensure the secrecy of their ballots. If an employee, having been given an opportunity to vote secretly chooses to make a display of him/herself or his/her ballot, that is up to that employee (and does not operate to invalidate a vote). But an employee must have that clear opportunity, free from the prying eyes of others, and without having to make obvious special efforts to do so him/herself. In other words, a trade union must structure a vote so that it is by secret ballot which employees can opt out of, rather than by some sort of open vote process which requires employees to individually opt in to a secret ballot.

34. We gave little weight to the fact that the trade union had conducted previous strike or ratification votes in substantially the same manner as it did in this case since none of them had previously been subjected to the same scrutiny as this vote. Nor was there any indication that any of those votes were mandatory, which this vote, for purposes of this application, was. The Board must focus on what happened in *this* case, in which it is clear that it was not only highly probable that the bargaining committee, Local President and National President, who had recommended a strike action, and other employees, saw and were seen to see the choice other people made on their ballots; the evidence is clear that this did in fact happen.

35. Whether or not it is onerous to require a trade union to conduct strike and ratification votes by secret ballot, this is what the statute does. In any event, as the *RCA Limited* case demonstrates, it is neither onerous nor difficult for a trade union to do so. There are numerous ways of accomplishing this, without necessarily resorting to the procedures followed in Municipal, Provincial or Federal elections, although the Board is aware that some trade unions follow procedures substantially similar to those in public political elections in some internal election or vote situations.

36. In this case, we were not satisfied that the trade union had conducted the strike vote it relied on in accordance with the requirement of section 74(4) of the *Labour Relations Act*. The trade union did not take adequate steps to protect the employees' right to vote secretly. On the contrary, the procedure adopted by the union was a kind of open ballot, held under the scrutiny of union officials and other employees, where voters were subjected to the coercive effects of open votes which subsection 74(4) is intended to prevent. This was not a secret ballot vote, which is what subsection 74(4) requires. We therefore dismissed this application as aforesaid.

37. The day after the Board gave its oral decision dismissing this application, the trade

union applied for reconsideration under section 108(1) of the *Labour Relations Act*. Counsel (not Mr. Luce) for the trade union describes the basis for its request for reconsideration as follows:

16. The union seeks a reconsideration on two grounds:

- a) the decision and this request raise significant and important issues of Board Policy;

John Entwistle Construction Limited [1979] OLRB Rep Nov. 1096

Consolidated Bathurst Packaging Ltd. [1990] 1 S.C.R. 282

- b) the summary manner in which the decision was made does not reflect an adequate consideration of the serious policy issues raised in the Board's consideration of s.74(4) of the *Act*. The union has not had a previous opportunity to raise an objection on this basis.

Bairoda Masonary Inc. [1994] OLRB Rep Mar 204

17. The union submits that the Board ought to reconsider its decision in view of the serious policy issues implicit therein.

In particular, the union submits that the Board ought not to take on a role as the regulator of internal unions procedures to an extent which is not expressly mandated by the legislation.

38. Section 108(1) of the *Labour Relations Act* provides that:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

This provision gives the Board a broad discretion to reconsider any of its decision. However, the same provision, and legal and labour relations considerations, also demand that the Board operate from the premise that a Board decision should be final and conclusive for all purposes unless there is good reason to change it. Accordingly, the Board will generally not reconsider a decision unless an obvious error has been made; or a request for reconsideration raises important policy issues which have not been given adequate attention or consideration; or the party requesting reconsideration proposes to adduce new evidence which it could not, with the exercise of reasonable diligence, have obtained and adduced previously, and which new evidence would, if accepted, have a material impact on the decision in question; or a party seeks to make representations which it has had no previous opportunity to make. Section 108(1) is not intended to provide an opportunity for a party to reargue its case, either *de novo* or as a form of appeal.

39. There is nothing in the trade union's request for reconsideration on the merits of the Board's decision, including any issues of "Board Policy" which could not have been raised at the hearing on June 27 and 28, 1994. Indeed, as the trade union itself states (at paragraph 11 of Schedule 1 to its request for reconsideration application): "The parties made full argument on the issues.", including the propriety of the strike vote and all issues associated with the interpretation and application of section 74(4) of the *Act*.

40. Further, this was not a lengthy or complex case. The Board heard the evidence and representations of the parties in approximately five and one-half to six hours of actual hearing time.

The Board gave complete and careful consideration to that evidence and those representations. There is no merit whatsoever to the trade union's assertion that the fact that the Board was able to come to a decision within an hour after the hearing concluded suggests that the Board failed to do so. The Board decided not to give reasons for its decision orally at the time it gave its decision because all members of the panel wanted an opportunity to structure their reasons carefully, in recognition of the significance of the decision to the labour relations community as well as to the immediate parties.

41. Finally, this is not a "Board Policy" case as such. It is a case which required the Board to interpret and apply the provisions of sections 73.1(2) and 74(4)-(6), not some unspecified "Board Policy". Nor did the Board take upon itself "a role as the regulator of internal unions [sic] procedures to an extent which is not expressly mandated by the legislation." On the contrary, section 73.1(2) and subsections 74(4)-(6) operate together to require the Board to review the manner in which a trade union which seeks the benefit of the replacement worker provisions in section 73.1 set up and conducted the strike vote(s) required by section 73.1(2). This is not a role which the Board has taken on on its own; it is a role which the legislation requires the Board to play.

42. In the result, the majority of the Board is satisfied that there is no merit whatsoever to the applicant's request for reconsideration. The majority is satisfied that there is no reason for the Board either to hold a further hearing, or to in any way reconsider its decision to dismiss this application. The trade union's request in that respect is therefore dismissed.

DECISION OF BOARD MEMBER P.V. GRASSO:

1. I have read the decision of the majority, and I respectfully dissent.

2. With respect, I feel that the result in this case is simply not consistent with the case law. In earlier decisions that dealt with subsections 74(4)-(6), the Board has been reluctant to intervene in internal union affairs and set an unrealistically rigid standard in the conduct of strike and ratification votes. I feel that the majority is doing here what the Board has previously said that it would not. It has set out on a course of detailed regulation which goes far beyond the abuses at which the provisions were aimed and which requires every trade union, however small, to operate as a model of electoral proficiency in the conduct of each internal strike and ratification vote.

3. As the majority has pointed out, the central case interpreting section 74(4) is *R.C.A. Limited* ([1981] O.L.R.B. Rep. Aug. 1159). In *R.C.A.*, the complainant employee, who was a long time union opponent, argued that a strike vote held violated what is now subsection 74(4) of the Act. The vote was held in a rented meeting hall, and the table on which employees marked their ballots did not have a screen. The scrutineer was standing close enough to the table so that, had he tried, he could have seen how employees voted, although he made no such attempt. As well, there was no ballot box. Instead, the ballots were piled on a table in front of the scrutineer, where they were later counted.

4. The Board dismissed the complaint. It was held that the omission of any detailed rules on balloting procedures in section 74 is a recognition that, beyond sheltering employees from the abuses of voice votes and votes by an open show of hands, it is undesirable to unduly restrict a union's latitude to conduct its own affairs. Rather, the Board held that the Legislature intended that unions should be afforded considerable flexibility in the conduct of strike votes. The test set out was an objective one, because the Board felt that such a test could be adhered to by small as well as large unions. The test is whether, in the circumstances, a reasonable employee would have a substantial reason to fear that her ballot would not remain secret: a mere possibility of identifica-

tion is not enough. Further, because of its reluctance to intervene in internal union affairs, the Board held that the procedure used should not be considered to have violated section 74(4) unless it is patently unfair or unreasonable.

5. In dismissing the complaint, the Board emphasized the fact that no employee, including the complainant, objected to the voting procedure at the time of the vote. Further, none of the employees who testified before the Board stated that they felt worried that others would see how they voted. The Board held that if an employee was worried about her vote becoming known to others, she could have shielded the ballot with her hand.

6. Although my learned colleagues have already quoted extensively from *R.C.A.*, I would also like to quote some relevant passages:

36. In interpreting section 63(4) [now 74(4)], it is important to bear in mind its history and its limited purpose. There are a number of provisions in the Act respecting voting by employees [, but section 74(4)] is the only section in the Act in respect of votes conducted by a trade union. That reflects a clear legislative intention, consistent with the recommendations of the Royal Commissions reviewed above, to avoid undue interference in internal trade union matters.

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39. The prevailing purpose of section [74(4)] must be seen as providing a minimum of protection to employees to ensure that the voting rights which they exercise in ratification and strike votes are unfettered by coercion, intimidation & undue influence. Strike and ratification votes can, as in the instant case, be hotly contested within a bargaining unit. In light of the history canvassed above, there can be little doubt that section [74(4)] was specifically designed to eliminate the mischief of voice votes or votes by an open show of hands at union meetings called to resolve issues of strike or ratification. [Section 74(4)] emphasizes the paramount interest in all cases of protecting the individual's right to vote secretly.

40. The wording of the section is deliberately general. Section [74(4)] speaks of ballots, but does not require that they be cast at a meeting or that a ballot box be used. That is in keeping with the realities of collective bargaining. ...The omission from section [74(4)] of any detailed rules on balloting procedures is a recognition that beyond eliminating the mischief described above, it is undesirable to unduly restrict a union's latitude to conduct its own affairs. It is also unrealistic to expect union meetings to be models of parliamentary democracy. The section is therefore limited to requiring a union to take adequate steps to shelter employees from the abuses of open voting.

41. In its present form section [74(4)] is responsive to a number of the concerns expressed in the report of *Woods Task Force* which, at p. 153, made the following observations and recommendations:

There is no question that employers, unions and employees and the government as custodian of the public interest all have an interest in the issue of ratification votes. Nevertheless, in our view the question of ratification votes is primarily the business of unions. ...The public interest in the system of collective bargaining justifies regulation to ensure a vote that fairly represents the judgement of the constituents. We therefore recommend that where a ratification vote is taken, it be by secret ballot and that the constituents have maximum access to the ballot. [pp. 1168-1169]

• • •

47. Unions are associations of employees which vary greatly in size and sophistication. In the interpretation of section [74(4)] the Board should strive to apply a standard which can be readily adhered to by any union, whether it be a large international or a small local. It would in our view depart from the intention of the section and take it far beyond the mischief against which it was aimed to require every trade union to operate as a model of electoral proficiency in the conduct of each internal ratification vote. There is obviously something of an honour system in any

system of balloting. Voters can generally expect that other voters and voting officials will respect their privacy when a secret ballot is being conducted. There is no reason, absent compelling evidence to the contrary, why that presumption should be any less valid when a group of employees conduct a secret ballot through the union.

48. In giving content to the requirement for secrecy in section [74(4)] the Board should respond to situations which give rise to a genuine basis for concern. By the same token it should not give undue attention to fanciful or technical objections unsupported by substantial evidence. In assessing the manner of balloting under section [74(4)] the Board must therefore apply an objective standard. It must determine whether in all the circumstances a reasonable employee would have substantial reason to fear that his ballot would not remain secret.

• • •

53. The complainant argues that the mere possibility of identification offends the section. We cannot agree. To accept that argument is to reduce the section to an unduly narrow standard. Abuse is possible in any election no matter what precautions are taken. Having regard to the purpose of the section and the context in which it applies the more appropriate approach is to examine whether the manner in which a ballot is conducted gives rise to a perception among reasonable employees of a real likelihood that individual choices will be identified, so as to cause the kind of apprehension that can materially inhibit the expression of the true wishes of the individuals in the bargaining unit. That question can only be answered in individual cases by closely examining all of the circumstances. [pp. 1171-1172]

7. The test set out in *R.C.A. Limited* was applied in *Northover v. Inter-Bake Foods Ltd.* ([1981] O.L.R.B. Rep. Aug. 1145). In dismissing the section 74(6) complaint in that case, the Board made the following observations:

11. In the circumstances, we are satisfied that all the bargaining unit employees were given a reasonable opportunity to participate in the secret ballot vote and we do not agree that section 63 [now section 74] was intended to set down a rigid standard of trade union procedure for strike and ratification votes. Nothing done in the instant case strikes us as so patently unfair or unreasonable to merit intervention under this section. See *RCA Limited*, [1981] O.L.R.B. Rep. Aug. 1159. To intervene in the instant case would set this Board on a course of detailed regulation we are reluctant to embark upon. Trade union democracy is amply suited to handling controversy of this kind.

The Board's approach in *R.C.A.* has also been followed by the British Columbia Labour Relations Board (see, for example, *Canyon Aerial Tramways Ltd. & H.R.C.E.B.U., Local 40* (16 July 1982), *Annotated B.C. L.R.C.* (Vancouver: Butterworths, 1993) 5:3014).

8. The Board recently dismissed another section 74(4) complaint in *Katkic v. C.A.W., Local 1285*. ([1991] O.L.R.B. Rep. Feb. 223). In *Katkic*, employees attending the strike/ratification vote meeting were handed a ballot when they entered the rented meeting hall. Employees took the ballots to their seats and listened to the union's analysis of the proposed collective agreement. During that discussion, which lasted one hour, the union President indicated that the ballot boxes were at the front of the room and employees should cast their ballots before leaving. Prior to the vote, the President also called for a motion that the settlement be approved. The motion was made, seconded, and approved by a show of hands. The Board held that section 74(4) was not violated since, in its opinion, the show of hands only served to formally conclude discussion and did not affect the secret ballot vote.

9. It remains to apply the *R.C.A.* test to the facts before us. To reiterate, the test looks at all the circumstances of the vote, and considers whether a reasonable employee would have a substantial reason to fear that her ballot would not remain secret: a mere possibility of identification is not enough. Further, the Board should not intervene unless the procedure used was so patently unfair or unreasonable that it merits intervention.

10. I am generally in agreement with the facts of this case as set out in the majority decision, with the exception of paragraph 25, which states that "It is also clear that employees who marked their ballots at the ballot box table did so under the scrutiny of the union's bargaining committee..." With respect, I have formed a different conclusion on this point. In my opinion, the evidence did not establish that the Committee 'scrutinized' the voting employees, but rather that from where they were sitting, they were capable of seeing how the employees voted if they looked.

11. Based on these facts and applying the *R.C.A.* test, I am of the opinion that a reasonable employee would not have felt that her ballot have remained secret. Even if I am wrong in this regard, the procedure used was not so patently unfair or unreasonable that it merits attention. To require more would ignore the realities of collective bargaining and would force unions to operate as models of electoral proficiency. As the majority has conceded, none of the employee witnesses felt inhibited in expressing their personal choice nor did they feel uncomfortable with the voting arrangements. Rather, the testimony suggests that most of the employees did not care whether or not others knew how they voted. Also, there was no suggestion that employees could not have shielded their ballots.

12. For all of the foregoing reasons, I feel that the strike vote held by Local 112 of the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada on February 6, 1994, was conducted in accordance with the provisions of subsection 74(4) of the *Labour Relations Act*, and is therefore a strike vote to which section 73.1 applies.

13. In view of my decision on the merits of the case, I would have granted the Applicant the request for reconsideration.

1406-94-M Hotel Employees Restaurant Employees Union, Local 75 ["Local 75"], Applicant v. **Westbury Howard Johnson Hotel** ["the Westbury"], and Hotel Employees Restaurant Employees International Union ["the Parent Union"], Responding Parties

Interference in Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Trusteeship - Unfair Labour Practice - Union Successor Status - Local 75 of Hotel employees' union purporting to disaffiliate from union - Local placed under trusteeship - Local 75 filing unfair labour practice complaint against union and named employer in connection with employer's decision to retain dues in escrow - Local 75 seeking interim order directing employer to remit dues to it - In response to Local 75's application, union filing its own unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own interim relief application - Board not persuaded that any interim order warranted at this stage - Application for interim relief dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Douglas J. Wray* and *M. Church* for "the Parent Union"; *Alick Ryder* and *David Wright* for "Local 75"; *David Cot 2i* and *Brian McLean* for "the Westbury"; *Irv Kleiner* and *Lorretta Merritt* for The Holiday Inn (King Street).

DECISION OF THE BOARD; August 5, 1994

I

1. This is an application for interim relief that has been filed in connection with an unfair labour practice complaint.
2. The unfair labour practice complaint and certain related proceedings are scheduled to come on for hearing before the Board in late August or early September.
3. It is anticipated that these proceedings before the Board will be disposed of relatively quickly.
4. This application for "interim relief" concerns what is to happen in the meantime.
5. The provisions of the *Labour Relations Act* ("the Act") to which reference should be made are as follows:

[Power to Grant Interim Relief]

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

* * *

[Employer Interference]

65. *No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.*

[emphasis added]

* * *

[Intimidation or Coercion]

71. *No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.*

[emphasis added]

* * *

[Locals under Trusteeship]

84.- (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union. under the constitution or by-laws of the provincial, national or international trade union is suspended, shall. within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.

6. In order to understand what this application is about, it is necessary to sketch in some background. To make the decision easier to read, I will sometimes refer to Hotel Employees, Restaurant Employees International Union as the "Parent Union" or "HERE". Local 75 of the Hotel Employees, Restaurant Employees International Union will be referred to simply as "Local 75".

7. The officers of Local 75 will sometimes be referred to as the "Belanger group" because Jean-Guy Belanger is the President of Local 75 and speaks on behalf of the Local executive. As will be seen below, one of the problems in this case is that two contending factions - the Belanger group, and officials of the Parent Union - both claim to speak on behalf of Local 75 and its members.

II

8. Hotel Employees, Restaurant Employees International Union is a trade union with members in the United States and Canada. Like many unions, the Parent Union is subdivided into various "local unions" that are defined on a geographic basis.

9. A "local union" is both a creature and component of the parent organization. However, under the *Labour Relations Act*, a "local" is also a "trade union" in its own right, that is capable of holding and exercising the collective bargaining rights to which the Act is addressed.

10. But, of course, a trade union is a legal construct just as a corporation is. A union can only act - for example, engage in bargaining with an employer - through the efforts of the human beings who are its officers or members. And the Act says nothing about how those human agents are selected or elected. In fact, the Act says very little about internal union affairs. The internal workings of a union - including the selection of its officers, employees or agents - are governed by the union constitution.

11. Local 75 is (or was) a local subdivision of the Hotel Employees, Restaurant Employees International Union. Local 75 has 6,200 members. Local 75 is named on 87 collective agreements with 75 employers across Ontario.

12. The Westbury Hotel, in Toronto, is one of those employers. The Westbury is one of eight Toronto hotels that are bound by the same collective agreement with Local 75.

13. In recent months, differences have arisen between the officials of Local 75 and the officials of the Parent Union. The details and dimensions of that dispute are not entirely clear. It suffices to say that the controversy involves the administration of Local 75, the way in which Local 75 has been managing its affairs, and the whereabouts of some \$400,000 said to be owing to the Parent Union.

14. These matters are internal to the union. They are organizational, administrative, and "political". They are not subject to overt statutory regulation, nor do they raise an obvious public policy question, addressed by the Statute.

15. On July 12, 1994, Local 75 held its regularly-scheduled membership meeting at the Primrose Hotel in Toronto. The notice for this meeting lists its purpose as "Union business". There is nothing in the notice that would advise Local 75's 6,200 members that anything special

was going to happen at the meeting. Nor am I able to say with any certainty that notice of the meeting was posted in a timely way on the premises where the members worked, or that it was posted in such manner that it would likely come to the attention of employees who might be interested in attending the meeting.

16. There was no other written notice concerning the purpose of the July 12, 1994 meeting. There was no verbal notice or advice that anything special or important was to be dealt with. In particular, the 6,200 members of Local 75 had no advance notice that the question of withdrawal from the Parent Union would be discussed or voted on at the meeting. Nor was there any notice to the Parent Union that the issue of “disaffiliation” would be addressed on July 12, 1994.

17. Withdrawal from the Parent Union is contemplated by Article XI, Section 15 of the International Union Constitution. That provision of the HERE Constitution reads as follows:

Withdrawal of a Local Union from the International Union may not take place as long as three members of the Local object.

Withdrawal from the parent organization appears to require the almost unanimous consent of the Local membership. Any three members can veto such withdrawal.

18. The Local 75 membership meeting took place, as scheduled, on July 12, 1994. The meeting began shortly after 5:00 p.m. There were approximately 57 of the Local’s 6,200 members in attendance - that is, less than 1% of the total Local membership. It does not appear that there were any members of the Local from outside the Toronto area.

19. At the meeting on July 12, 1994, the Local 75 executive submitted a resolution to withdraw from affiliation with the Parent Union. This resolution was purportedly made pursuant to Article XI, Section 15 of the International Constitution, which is set out above.

20. As I have already noted, there was no advance notice to the 6,200 members of Local 75 that this particular motion would be debated; and, in fact, there does not seem to have been much debate. There was no secret ballot vote. There was no roll-call vote. Members present were asked to vote “Yay” or “Nay”, and the entire issue was dealt with in a matter of minutes. The members then went on to approve two related matters:

- (a) a motion to authorize the officers on behalf of Local 75 to open a new bank account; and
- (b) a motion to hold a special general membership meeting on August 9, 1994 “to vote on the Local’s proposed new Constitution”.

21. By letter dated July 13, 1994, Jean-Guy Belanger advised the General President of the Parent Union that Local 75 had withdrawn from the parent organization. Mr. Belanger relied upon Article XI, Section 15 of the International Constitution.

22. Mr. Belanger also wrote to the various employers with which Local 75 had collective bargaining relationships. Mr. Belanger advised that Local 75 had broken away from the Parent Union, and that from now on, the employers would be expected to deal exclusively with the officials of Local 75. Mr. Belanger asserted that any dues monies payable under the collective agreements should be remitted exclusively to the Belanger group at Local 75.

23. On July 15, 1994, three members of Local 75 signed a document (since transmitted to Local 75) which reads as follows:

"In accordance with Article XI, Section 15 of the Hotel Employees and Restaurant Employees International Union's Constitution, we the following members of HERE Local 75 of Toronto, Ontario, do not want our Local to withdraw from HERE International Union".

The purpose of this document was to demonstrate to the Belanger group that at least three members objected to disaffiliation, and that, therefore, withdrawal could not take place under Article XI, Section 15 of the Constitution.

24. I also have before me a number of petitions with the following preamble:

"In accordance with Article XI, Section 15 of the Hotel Employees and Restaurant Employees International Union's Constitution, we the following members of HERE, Local 75 of Toronto, Ontario do not want our Local to withdraw from HERE International Union".

Each of these documents has a space where Local 75 members can record their name, their signature, the date, their social insurance number, and their place of work.

25. Between July 15 and July 21, 1994, documents in this format were signed by a large number of Local 75 members working for various employers in Toronto and elsewhere. The number of Local 75 members who have signed such statements of opposition now greatly exceeds the 57 members who attended the July 12, 1994 membership meeting and voted in favour of withdrawal from the Parent Union.

26. On Saturday, July 16, 1994, Mr. Jerry Jones, a business representative of Local 75, advised Jim Whyte, President of HERE Local 442 (a sister Local) that the reason no one was informed in advance of the proposed withdrawal from the Parent Union was the Belanger group's fear that three members of the Local would object and that, therefore, withdrawal could not be accomplished pursuant to Article XI, Section 15. Mr. Jones further advised Mr. Whyte that Local 75 had some five million dollars at its disposal to finance the new operation.

27. By letter dated July 20, 1994, the General Secretary of the Parent Union gave notice to Local 75 of pending charges that the Local and its officers had breached the International Union Constitution, by attempting to disaffiliate without the consent of the membership.

28. By letter dated July 20, 1994, the General President of the Parent Union notified the Belanger group that he had appointed Mr. James Stamos as Trustee in accordance with the terms of the HERE Constitution. Mr. Stamos is an International Vice-President of the Parent Union with offices in Montreal.

29. On July 21, 1994, the General President of the Parent Union further notified both Mr. Stamos and Mr. Belanger, that an international auditor - Mr. David S. Perry - had been appointed to audit and investigate the financial affairs of Local 75. Mr. Stamos was to manage the affairs of the Local, while Mr. Perry pursued his inquiry. According to Mr. Stamos, there have been serious financial irregularities in the Local's affairs and, in recent years, the Local has lost a large number of members and some bargaining units.

30. Mr. Stamos has been an International Vice-President of the Parent Union for approximately twenty years. He was appointed Canadian Director in 1987. From his office in Montreal, he travels across Canada to conduct union business. He has been appointed Trustee for various locals on several occasions.

31. Mr. Stamos was Trustee for Vancouver Local 40 for about 2½ years, from September 1982 until June 1985. The Vancouver Local is about twice the size of Local 75. It has approxi-

mately 12,000 members and over 300 collective agreements. Mr. Stamos has also acted as Trustee for locals in Ontario from time to time (including the predecessor local to Local 75), and has assisted with other trusteeships, although not technically appointed as Trustee.

32. Mr. Stamos is generally familiar with the affairs of Local 75. He is a Trustee of Local 75's health and welfare plan, and a Trustee of the Local 75 pension plan. He is also involved with the Local's dental clinic. He knows the officers, staff and many other individuals involved with the day-to-day operations of Local 75, including Mr. Belanger.

33. It appears that Mr. Stamos' appointment as Trustee was properly made and confirmed under the terms of the HERE International Constitution. No one alleges otherwise.

34. On July 22, 1994, Mr. Stamos (and another individual) attended at the offices of Local 75, with a view to serving some documents and assuming control of the Local's affairs. Mr. Stamos asserted that he was entitled to manage the Local because he had been properly appointed to do so under the terms of the HERE Constitution. His efforts were resisted by Mr. Belanger, who, to date, has not conceded access to the premises, has not produced documents concerning Local 75, and has not given the auditor access to Local 75's financial records.

35. On July 25, 1994, Mr. Stamos was advised by the administrator of Local 75's trust plans (Nelson B. Crowder & Associates Inc.) that he (Stamos) had been removed as a Trustee of those plans. There was no prior notice of this intended action, nor is there any indication that there was a meeting of trustees called to consider it. Since these are jointly-trusted plans with union and employer representatives, it is not clear how Mr. Stamos' purported dismissal was effected or whether it was valid.

36. Similarly, it is not clear how, or on what basis, Local 75 could remove Paul Clifford's local union membership or Mr. Clifford's membership in the local Health and Welfare Plan. Mr. Clifford is a member of Local 75 and a contributor and beneficiary to the Welfare Plan. However, Mr. Clifford is also an organizer employed by the International Union, who advised the Parent Union of the purported separation of Local 75. It is evident that these actions were taken against Mr. Clifford because he was opposed to Local 75's withdrawal from the Parent Union. It remains to be seen whether this reprisal has any legal foundation.

37. The material does not disclose whether other employees of the Parent Union (i.e., union "civil servants" like Mr. Clifford) are prepared to follow the direction of the Trustee or the direction of the Belanger group.

38. In accordance with his powers under the Constitution, Mr. Stamos has asserted his right to manage the affairs of Local 75. Mr. Stamos has advised employers that the purported breakaway is improper, and that they should deal with him rather than Mr. Belanger. Mr. Stamos has advised that, as the Trustee duly appointed under the HERE Constitution, he is entitled to run the Local, and the Belanger group is not.

39. Among the employers receiving such advice is the Westbury Hotel. The Westbury Hotel is the only employer named in Local 75's application for interim relief; however, it is clear that it is but one of a number of employers in the same position. Each of these employers is bound by a collective agreement requiring that union dues be deducted from the wages of employees and remitted to the credit of Local 75.

40. Mr. Belanger has demanded that those union dues be sent to him and his group. Mr.

Stamos has advised employers to hold all union dues in escrow and not to pay them out pending further notice and action by the Parent Union to protect its status and secure its property.

41. In short, employers like the Westbury are “caught in the middle” between rival union factions, each of which asserts the right to represent Local 75’s 6,200 members, and each of which wants to receive the dues monies from those members. Thus, even if “bargaining rights” under the *Labour Relations Act* are held exclusively by Local 75, there is a dispute between Mr. Belanger and Mr. Stamos about who can exercise those bargaining rights and receive the membership dues. To put the issue another way: even if “bargaining rights” were vested in Local 75 and remain unaffected by what has happened, there is a controversy over the property of Local 75 and money that Local 75 has received or is entitled to receive.

42. Mr. Belanger asserts that he has the right to receive these dues monies because Local 75 has disengaged from the Parent Union.

43. Mr. Stamos asserts that he has the right to receive the dues monies because Local 75 has not properly withdrawn from the Parent Union, and he has been properly appointed Trustee under the Union Constitution.

44. And, of course, while these union dues are deducted from employee wages whether they like it or not, no one has asked *them* where they want the money to be sent. Given the process adopted by the Belanger group, to date, the 6,200 members of Local 75 have largely been left on the sidelines.

45. The Westbury recognizes that it has a collective agreement with an entity entitled “The Hotel Employees, Restaurant Employees, Union, Local 75 of the Hotel Employees, Restaurant Employees International Union”. The Westbury wishes to comply with the terms of that collective agreement and remit union dues in accordance with the collective agreement. But because of the dispute between union officers, the Westbury does not know who to remit those dues to.

46. If the Westbury remits those dues to Mr. Belanger, it may be subject to complaint by Mr. Stamos and his group. On the other hand, if the Westbury remitted the dues to Mr. Stamos, it would be subject to complaint by Mr. Belanger. And at the present time, the Westbury is unable to determine who has the better legal claim to the dues money or who has the better claim to represent its employees. However, the Westbury does not want to expose itself to liability by paying the money over to or dealing with the “wrong” party - that is, the party whose legal claim is ultimately rejected.

47. The Westbury has not “taken sides”, nor preferred one group of union officials over another. The Westbury wants to remain neutral as between the two factions or groups of union officials. The Westbury does not want to participate in or interfere with the formation, selection or administration of a trade union, or the representation of employees by a trade union. Nor does it want to improperly contribute financial or other support to a trade union - even inadvertently. The Westbury does not wish to interfere with or impede the rights of its employees.

48. There is really no dispute that the Westbury is acting in complete good faith, in an effort to *avoid* controversy. There is no “anti-union animus” in the sense that those terms are usually used in unfair labour practice cases. Indeed, the Westbury’s principal concern is to *avoid* any action which might be construed as improper or might be considered an interference with its employees’ rights.

49. The Westbury is not currently engaged in collective bargaining. The Westbury currently

has no pending grievances alleging a breach of the collective agreement. In the case of the Westbury, there is no ongoing collective bargaining activity that is being prejudiced by this dispute between union officials. In the Westbury's case, there are no outstanding employee problems that will be seriously prejudiced if "put on hold" for a few weeks.

50. In response to this application for interim relief made by Local 75 (Board File 1406-94-M), the Parent Union has filed *its own* unfair labour practice complaint, its own successor rights application under section 63 of the Act, and its own request for interim relief. The Parent Union's applications name all 75 employers potentially affected by the purported breakaway of Local 75.

51. The Parent Union's applications have a broader legal base and embrace all of the employers with which Local 75 has collective bargaining relationships. In the Parent Union's submission, Local 75's limited application respecting the Westbury Hotel should not be dealt with in isolation from the Parent Union's more comprehensive application respecting the employers and employees as a whole.

52. Because the applications filed by the Parent Union involve 75 employers in various parts of Ontario, service and other processing could not be completed prior to the hearing of Local 75's "interim relief" application respecting the Westbury. Strictly speaking, therefore, the Parent Union's applications are not before me. Nor am I able to say, with certainty, whether other employers would adopt the same position as the Westbury. I do note that, as it turned out, certain other employers did become aware of the hearing in File 1406-94-M involving the Westbury, and did appear at that hearing to make representations. Like the Westbury, they wished to maintain a "neutral position" and, so far as possible, carry on business as usual.

53. At least one of those employers is currently engaged in collective bargaining and has an outstanding grievance which is on its way to arbitration. This employer (The Holiday Inn, King Street) was concerned that bargaining or grievance arbitration would be derailed by this internal union dispute; and sought the Board's assistance to preserve "business as usual". However, even in this case, as things now stand, one cannot conclude that the arbitration case will not proceed, or that bargaining will not be successfully concluded (albeit perhaps not as quickly as anticipated).

54. If either of the protagonists accommodates the other, there is no reason why these employer and employee interests cannot be protected; for, after all, *it is in the members' interest that these ongoing matters be addressed*, and regardless of who gives direction, the union still has a statutory duty to bargain in good faith, a statutory duty of fair representation, and so on. A concrete problem will not materialize unless in the next few weeks, one protagonist obstructs the other to the point that attention to employer or employee interests is not just delayed, but completely frustrated.

55. As things now stand, Local 75 has no constitution or by-laws other than those that were in place prior to the purported breakaway on July 12, 1994. The documents defining the current legal character of Local 75 as a "union" all link it directly to the HERE Constitution. For example, the Local By-Laws include these provisions:

Article I - Section 1 - "Name and Object"

This organization shall be known as Hotel Employees, Restaurant Employees Union, Local 75, Toronto, Ontario, Canada, and vicinity, *affiliated with Hotel Employees and Restaurant Employees International Union.*

Article II - Section 1 - "Membership"

Membership of this organization shall consist of an unlimited number of workers in the Hotel, Motel, Restaurant and Related Industries, *who agree to abide by the By-laws of this Local and the Constitution of the Hotel Employees and Restaurant Employees International Union*, as presently in effect or as hereafter amended.

[emphasis added]

If an organization needs a constitution to be a "union" under the Act, the only one that Local 75 has, makes it a subordinate body of HERE, and binds its members to the HERE Constitution.

56. The officials of Local 75 (i.e., Mr. Belanger and his supporters) propose to have a special general membership meeting on August 9, 1994, where, it is said, the Local's by-laws will be amended and/or a new constitution adopted, so as to constitute Local 75 as an independent entity. There is nothing before me to confirm what the arrangements for this meeting are, what notice will be given, or how many members will attend; but as I understand it, there are no current plans for a referendum to test the members' wishes. And, as I have already noted, quite a number of Local 75 members have indicated, in writing, that they do not want to withdraw from the Parent Union.

57. With this review of the background, I turn to the main question before me: whether Local 75's application for interim relief should be granted in whole or in part; and, if so, what form such interim relief might take.

Decision

58. Section 92.1 of the Act gives the Board broad discretion "in a pending or intended proceeding" to "grant such interim orders, including interim relief, as it considers appropriate, on such terms as the Board considers appropriate". In the exercise of that discretion, the Board may consider such factors as: whether the applicant for interim relief makes out an arguable case "on the merits" of the main proceeding; the balance of convenience or harm as between the litigants in the main proceeding; the potential effect on third-party interests; the overall labour relations context; and what appears to make the most "labour relations sense" in all the circumstances.

59. Having reviewed the circumstances of this case, as a whole, I am not persuaded that any interim order is warranted, at this stage.

*

60. As I have already noted, Local 75's application for interim relief (the only one before me) is filed in conjunction with an unfair labour practice complaint. Local 75 asserts that the Westbury and the Parent Union have contravened sections 65 and 71 of the *Labour Relations Act*. Those sections have been reproduced above. However, it is not at all clear that Local 75 has made out an arguable case against either the Parent Union or the Westbury.

61. I will consider each of these parties in turn.

62. Section 65 of the Act applies to *employers* and persons acting on behalf of *employers*. The Parent Union does not fall within those parameters. It is clearly not an employer, nor, in this case, is it acting on behalf of an employer. It is difficult to see how section 65 of the Act has any application to the Parent Union.

63. Nor is section 71 obviously applicable.

64. The Parent Union has purportedly put Local 75 under trusteeship, in accordance with the terms of the HERE International Constitution. The autonomy of the Local has been suspended, and the powers formerly exercised by the Local officers are now said to be in the hands of the Trustee.

65. The administration of Local 75 is clearly being affected by what has happened, but it is important to note that the power to impose a trusteeship is a common feature of most union constitutions, and the exercise of that authority is recognized by section 84 of the *Labour Relations Act*. It is not evident that a trusteeship is per se illegal, or, in itself constitutes some form of "intimidation" or "coercion".

66. No doubt the Trustee is pressing his asserted right to manage the affairs of the Local, and to this end, he has attempted to take possession of union property, to examine the Local's financial records, and to inform employers that they should deal with the Trustee rather than Mr. Belanger and his group. However, these are the actions one would expect a trustee to take; and, on the material before me, there is no actual "intimidation" or "coercion" involved - although no doubt from Mr. Belanger's perspective, there is interference with what he may consider to be his legal prerogatives.

67. But I repeat: section 84 of the Act expressly contemplates the possibility of a "trusteeship", and does not contemplate or provide for supervision or review by this Board until a year has gone by. Until that time, the actions of the Trustee are regulated by the union Constitution, with reference, as necessary, to the ordinary civil Courts. They are matters of internal union affairs over which this Board has no original jurisdiction, and it is by no means clear that the Board is the place where they can or should be resolved.

68. Against that background, it is difficult to conclude that a trusteeship, by itself, constitutes some sort of unfair labour practice, or that the efforts of a trustee to manage the affairs of the local or conduct an accounting constitutes some arguable breach of section 71 of the Act. In the instant case, it appears to me that Mr. Stamos' appointment was properly authorized under the terms of the HERE Constitution (leaving aside for now whether Local 75 is still part of that organization or subject to either the Constitution and the supervision of the trustees), and that his actions, to date, cannot be characterized as "intimidation" or "coercion" within the meaning of section 71 of the Act.

69. I am uneasy about using discretionary powers, in a dubious case, where the Legislature has not given the Board express regulatory authority.

70. Obviously, this is not the place to make any definitive determination of the parties' rights under the HERE Constitution, or the Local union by-laws - not least because these matters are normally dealt with by the Courts, not the Board, and they may figure in the deliberations of the Board panel ultimately seized with the merits of the case. However, it is difficult to be sanguine about the way in which the officials of Local 75 have attempted to disengage from the Parent Union.

71. The decision to disaffiliate was made by a tiny minority of members, without any general notice to the membership that this step was being contemplated. The process undertaken effectively (and it seems intentionally) excluded 99% of the Local's members, who, the Local officers now say, should be bound by the result.

72. It may well be that if the Local officers had disclosed their intention in advance, the Parent Union would have mobilized membership opposition and put the Local under trusteeship.

That is what eventually happened. But the fact remains that the actions of the Local 75 officials have a very dubious constitutional foundation and do not plainly reflect the wishes of more than a handful of the Local union's members. Indeed, it is more than arguable that the actions of the Belanger group are both contrary to the Union Constitution, and lack democratic legitimacy; for if reference is made to Article XI, it is difficult to ignore the written opposition of more members than supported the breakaway in the first place. And if Local 75 has any "constitution" today regulating its affairs, it is a constitution that still links and binds it to the HERE Constitution and its processes.

73. The situation presented by this case is much more like a "palace coup" than a membership revolt; and, in the circumstances, I think the Board should be wary about using its interim discretionary powers to give statutory confirmation to that situation. There is something to be said for Mr. Wray's submission that the Belanger group should not be able to create confusion and contention, than rely on those very problems to justify interim confirmation of their position. The submission is reinforced by the fact that the Legislature has not given the Board the express authority to regulate internal union disputes of this kind. There is also something to be said for the submission that whatever the Belanger group was trying to do, the fact is the only constitution defining the organization and its members is the HERE Constitution, and the fact is, more than 3 members oppose disaffiliation.

74. Local 75's allegations against the Westbury are equally dubious; and, its arguments are also somewhat circular.

75. It is said that the Westbury is "interfering" with Local 75's representation rights, by paying dues monies into trust until the dispute between the Belanger group and the Trustee is resolved by a Court or tribunal with the authority to do so. However, it is perfectly plain that the Westbury is trying, as best it can, *not* to favour either of the protagonists, and not to interfere with the administration or internal processes of the union; moreover, if the Westbury did pay out these funds to one or other group, it is by no means clear whether, or how, they might be recovered by the person with the better claim. Not only does the employer risk entering the political fray by appearing to favour one side or the other, but it risks having to pay twice. And, of course, Mr. Belanger's assertion that the monies "should" be remitted to a bank account controlled by his group (rather than to the Trustee) depends upon an assumption that he has the better claim - something that is far from clear on the material before me and would be equally unclear to the Westbury. Indeed, the trusteeship seems regular while the breakaway is problematic, and if that situation is ultimately sustained, the money "should" be going to the Trustee.

76. It appears to me, therefore, that faced with these competing claims, the Westbury is acting prudently and properly when it pays the disputed dues monies into a separate trust account, pending a legal determination as to who is entitled to receive them.

77. I am not prepared to interfere with that determination, or direct that these dues monies be paid, in the interim, to Mr. Belanger's group. Nor am I attracted to Mr. Ryder's alternative proposal that the Board appoint *its own trustee* who, in turn, would account for and disburse funds to the Belanger group to meet their and the Local's ongoing expenses. And I am not prepared to confirm the Belanger group as the entity with the power to manage the affairs of the Local or exercise bargaining rights.

78. Insofar as the Westbury is concerned, this internal union dispute has not had any adverse impact on ongoing collective bargaining activities. No collective bargaining has been postponed, no grievances have been delayed, and so on. However, even if such problems do arise and have to be addressed, the only thing that would prevent that from happening is the dispute

between Mr. Belanger and the Trustee, and the possibility of detrimental deadlock. But there is little evidence of that yet, no evidence of it at the Westbury, and, in my view, no compelling case that, at this stage, the Board should give exclusive powers or financial benefits to the Belanger group to which they may not be entitled under either the Act or the Union Constitution. And to the extent that issues of property rights, or trust funds may be involved, those are matters which are properly pursued in the Courts which have original jurisdiction to address them. Likewise, issues concerning fiduciary responsibilities are properly pursued in the Courts.

79. I am not unmindful of the uncertainty that this internal dispute may cause for employers and employees. I can appreciate that such employers are anxious to carry on “business as usual” and do not welcome either impediments to the collective bargaining process or the prospect of political turmoil in the workplace. However, strictly speaking, none of those employers are now before me; and it is not at all obvious what the appropriate global interim solution should be - or, indeed, whether there should be any general order as opposed to one tailored to particular employer/employee problems if and when they arise over the next few weeks. These doubts about the equity and efficacy of the order sought, together with my doubts about Local 75’s general position, all reinforce my reluctance to intervene, by way of interim order, in this internal union dispute.

80. This is not to say that a trustee’s actions will always be immune from scrutiny simply because he has been appointed under a union constitution, appointments of that kind are permitted by the Act, and there is no general Board power to oversee internal union affairs. Quite apart from judicial review, the Board might well choose to intervene in an appropriate case, if there is an appropriate legal and policy foundation. But the instant application is not such a case.

81. The employers are not without rights or remedies should their business interests be interfered with. Nothing in the *Labour Relations Act* alters the general proposition that “work time is for work”, and if union politics intrudes upon the workplace, the employer is entitled to take appropriate measures to ensure that the work gets done. Likewise, if there are particular problems that cannot be put “on hold” for a few weeks, the employer can take steps to “stay neutral”, to safeguard its position (as the Westbury did), or to seek its own interim relief to “break the log jam”. However, as things now stand, it appears to me that the best approach in this case is to get the litigation on the merits underway as soon as possible - with the caveat that serious problems can be addressed, as necessary, as they arise.

82. This may mean that certain collective bargaining processes will have to be suspended for the time being. But the fact is that there will not be complete certainty and stability until the legal issues between the parties are finally resolved by a Court or tribunal with the jurisdiction to do so. And it would be both unfortunate and counterproductive if litigation over “interim relief” questions were to delay the final resolution of the parties’ dispute.

83. For the foregoing reasons, this application for interim relief is dismissed.

The Litigation of the Merits of the Dispute

84. The parties have agreed to certain protocols to expedite the litigation of the merits of the dispute; however, they are hereby directed to consult with the Board in respect of that matter.

85. The Registrar is directed to make additional copies of this decision so that they may be posted on employer premises should employers consider this to be advisable.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2384-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent) v. The Independent Employees Association (Intervener)

Unit: "all construction labourers in the employ of Lodder Brothers Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2385-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent) v. The Independent Employees Association (Intervener)

Unit: "all construction labourers in the employ of Lodder Brothers Limited in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2526-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent) v. The Independent Employees Association (Intervener)

Unit: "all construction labourers in the employ of Lodder Brothers Limited in the County of Dufferin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2712-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent) v. The Independent Employees Association (Intervener)

Unit: "all construction labourers in the employ of Lodder Brothers Limited in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

0360-94-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Wilf Schon Masonry Ltd. (Respondent)

Unit: "all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Wilf Schon Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Wilf Schon Masonry Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0530-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. World Contractors Residential and Commercial Drywall & Painting Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of World Contractors Residential and Commercial Drywall & Painting Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of World Contractors Residential and Commercial Drywall & Painting Inc., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0579-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation employed at The Bay, Eastgate Square, 75 Centennial Parkway North, in the City of Stoney Creek and at The Bay, Limeridge Mall, 999 Upper Wentworth Street, in the City of Hamilton, save and except supervisors and persons above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

0605-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation employed at Eastgate Square, 75 Centennial Parkway North, in the City of Stoney Creek, save and except one working foreperson and persons above the rank of one working foreperson” (12 employees in unit)

0645-94-R: International Brotherhood of Painters and Allied Trades and Local Union 1819 (Glaziers) (Applicant) v. Insurance Glass Replacement Company Limited (Respondent)

Unit: “all glaziers and glaziers apprentices in the employ of Insurance Glass Replacement Company Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers apprentices in the employ of Insurance Glass Replacement Company Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0761-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation employed at The Bay, Mapleview Centre, 900 Maple Avenue, in the City of Burlington, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

0778-94-R: United Steelworkers of America (Applicant) v. Bayview-Wildwood Resorts Limited (Respondent)

Unit: “all employees of Bayview-Wildwood Resorts Limited in the Township of Severn, save and except General Manager, persons above the rank of General Manager, Assistant Manager, Assistant/Personnel Manager, Accounting/Waterfront Manager, Dining Room Manager, Head Chef, Rooms Supervisor and Maintenance Supervisor” (49 employees in unit) (*Having regard to the agreement of the parties*)

0796-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Sarnia Wilding Doors Limited (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of Sarnia Wilding Doors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of Sarnia Wilding Doors Limited in all sectors of the

construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0799-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Acme Tube Inc. of Canada (Respondent)

Unit: “all employees of Acme Tube Inc. of Canada at 61A Baywood Road in the City of Etobicoke, save and except Foremen/Supervisors, persons above the rank of Foreman/Supervisor, office, clerical, sales staff, and students employed during school vacation periods” (11 employees in unit) (*Having regard to the agreement of the parties*)

0805-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Nordell Excavating Limited (Respondent)

Unit: “all employees of Nordell Excavating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Nordell Excavating Limited in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0824-94-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Kitchener-Waterloo Record, A Division of Southam Inc. (Respondent) v. Record Mechanical Employees Association (Intervener) v. Sandra Fokma (Objectors)

Unit: “all employees of the Kitchener-Waterloo Record, a Division of Southam Inc., in its Advertising Department in the City of Kitchener, save and except Assistant Supervisor, persons above the rank of Assistant Supervisor, Executive Assistant and employees covered by an existing collective agreement as of June 7, 1994” (48 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0838-94-R: Ontario Public Service Employees Union (Applicant) v. Peel Non-Profit Housing Corporation (Respondent)

Unit: “all employees of Peel Non-Profit Housing Corporation located in the Regional Municipality of Peel, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period” (87 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0882-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. employed at its store at 3100 Dixie Road in the City of Mississauga, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, Personnel Clerks and students employed in a co-operative work program” (90 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0883-94-R: Teamsters Local Union No. 879 (Applicant) v. G.S. Dunn & Co. Limited (Respondent)

Unit: “all employees of G.S. Dunn & Co. Limited in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office, sales and laboratory staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

0886-94-R: Toronto Greenpeace Canvass Staff Association (Applicant) v. Greenpeace Canada (Respondent)

Unit: “all canvass staff of Greenpeace Canada employed in the Municipality of Metropolitan Toronto, save and except Assistant Toronto Canvass Director and persons above the rank of Assistant Toronto Canvass

Director and persons in bargaining units for which any trade union held bargaining rights as of June 4, 1994” (36 employees in unit) (*Having regard to the agreement of the parties*)

0897-94-R: Canadian Union of Public Employees (Applicant) v. Cedarbrook Lodge Management Corporation (Respondent)

Unit: “all office and clerical employees of Cedarbrook Lodge Management Corporation in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, Social Co-ordinator, Accounting and Marketing Manager and persons in bargaining units for which any trade union held bargaining rights as of June 13, 1994” (4 employees in unit) (*Having regard to the agreement of the parties*)

0908-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Aviscar Incorporated c.o.b. as Avis Car Rental (Respondent)

Unit: “all employees of Aviscar Incorporated c.o.b. as Avis Car Rental employed as Car Carrier Drivers and Helpers, Tow Truck Drivers in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office staff, Mechanics, part-time Shuttlers, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of June 13, 1994” (9 employees in unit) (*Having regard to the agreement of the parties*)

0910-94-R: United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Kelloryn Hotels Inc. c.o.b. as Howard Johnson Hotel (Respondent)

Unit: “all employees of Kelloryn Hotels Inc. c.o.b. as Howard Johnson Hotel in the City of North Bay, save and except supervisors, persons above the rank of supervisor, front desk, office, clerical, sales and night audit staff” (29 employees in unit) (*Having regard to the agreement of the parties*)

0922-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sterling Place Limited Partnership c.o.b. as Sterling Place (Respondent)

Unit: “all employees of Sterling Place Limited Partnership c.o.b. as Sterling Place in the City of Ottawa, save and except Supervisors and persons above the rank of Supervisor, Registered, Graduate and Undergraduate Nurses” (48 employees in unit) (*Having regard to the agreement of the parties*)

0924-94-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. Michael York (Toronto) Limited c.o.b. as Campbellford I.G.A. (Respondent)

Unit: “all meat department employees of Michael York (Toronto) Limited c.o.b. as Campbellford I.G.A. in the Town of Campbellford, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, Meat Manager and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0932-94-R: International Union of Elevator Constructors and its Local 96 (Applicant) v. I.T.M. Construction Inc. (Respondent)

Unit: “all journeymen and apprentice elevator constructors in the employ of I.T.M. Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice elevator constructors in the employ of I.T.M. Construction Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0943-94-R: Canadian Union of Public Employees (Applicant) v. Children’s Aid Society of Oxford County (Respondent)

Unit: “all employees of the Children’s Aid Society of Oxford County in the City of Woodstock regularly employed for not more than 24 hours per week, save and except Supervisors, persons above the rank of Supervisor, Office Manager, Executive Assistant and persons in bargaining units for which any trade union

held bargaining rights as of June 16, 1994” (4 employees in unit) (*Having regard to the agreement of the parties*)

0946-94-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Les Planchers en béton Corcordia Ltée c.o.b. as Concordia P.B. (Respondent)

Unit: “all construction labourers in the employ of Les Planchers en béton Corcordia Ltée c.o.b. as Concordia P.B. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Les Planchers en béton Corcordia Ltée c.o.b. as Concordia P.B. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

0947-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Osler Paving Ltd. (Respondent)

Unit: “all employees of Osler Paving Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Osler Paving Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

0949-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Janitorial Development Inc. Janitorial Development Company (Hamilton) Limited (Respondent)

Unit: “all employees of Janitorial Development Inc. and Janitorial Development Company (Hamilton) Limited in the Town of Mount Hope, employed specifically at Hamilton Airport, save and except non-working forepersons and persons above the rank of non-working foreperson” (3 employees in unit) (*Having regard to the agreement of the parties*)

0950-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at the Bank of Montreal Data Centre, 3398 Harvester Road and 865 Harrington Court in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

0964-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of North York (Respondent)

Unit: “all employees employed as Security Desk Operators for The Corporation of the City of North York in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor and persons in bargaining units for which any trade union held bargaining rights as of June 17, 1994” (5 employees in unit) (*Having regard to the agreement of the parties*)

0965-94-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses Pembroke Branch (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses

Pembroke Branch in the City of Pembroke, save and except supervisors and persons above the rank of supervisor” (21 employees in unit) (*Having regard to the agreement of the parties*)

0966-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Osler Paving Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all construction labourers, in the employ of Osler Paving Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

0972-94-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards in the employ of the Group 4 C.P.S. Limited in the Municipality of Metropolitan Toronto and the City of Mississauga, save and except supervisors, persons above the rank of supervisor and persons in bargaining units for which any trade union held bargaining rights as of June 20th, 1994” (98 employees in unit) (*Having regard to the agreement of the parties*)

0974-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Applicant) v. First Team Personnel Inc. (Respondent)

Unit: “all employees of First Team Personnel Inc. in the Municipality of Metropolitan Toronto, save and except supervisors and forepersons, persons above the rank of supervisor and foreperson, office, sales and accounting staff” (81 employees in unit) (*Having regard to the agreement of the parties*)

0977-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Independent Living Residences for the Deaf and Blind in Ontario (Respondent)

Unit: “all employees of Independent Living Residences for the Deaf and Blind in Ontario in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*)

0978-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Wexford Steel Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Wexford Steel Inc., in the Town of Oldcastle, save and except supervisors, persons above the rank of supervisor, office and sales staff” (48 employees in unit) (*Having regard to the agreement of the parties*)

0979-94-R: Brewery, General and Professional Workers’ Union (Applicant) v. East Toronto Community Legal Services Inc. (Respondent)

Unit: “all employees of East Toronto Community Legal Services Inc. in the Municipality of Metropolitan Toronto, save and except the Executive Director and persons above the rank of Executive Director” (5 employees in unit) (*Having regard to the agreement of the parties*)

0980-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses-Eastern Counties Branch (Respondent)

Unit: “all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses-Eastern Counties Branch in the City of Cornwall, the Counties of Stormont, Dundas, Glengarry, Prescott and Russell, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (36 employees in unit) (*Having regard to the agreement of the parties*)

1019-94-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. 500869 Ontario Inc. c.o.b. as Duntri Construction (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of 500869 Ontario Inc. c.o.b. as Duntri Con-

struction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 500869 Ontario Inc. c.o.b. as Duntri Construction in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1024-94-R: Canadian Union of Professional Security Guards (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited in the Regional Municipality of Niagara, save and except managers and persons above the rank of manager" (3 employees in unit) (*Having regard to the agreement of the parties*)

1026-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Adelaide Maintenance Limited (Respondent)

Unit: "all employees of Adelaide Maintenance Limited engaged in janitorial services at 700 University Avenue and 60 Murray Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1027-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at 100, 200 and 300 Consileum Place in the Municipality of Metropolitan Toronto, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff" (48 employees in unit) (*Having regard to the agreement of the parties*)

1076-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 800 (Applicant) v. Live Entertainment of Canada Inc. (Respondent)

Unit: "all wig, makeup and hairstylist personnel employed by Live Entertainment of Canada Inc. at the North York Performing Arts Centre in the Municipality of Metropolitan Toronto, save and except Assistant Technical Director and persons above the rank of Assistant Technical Director" (12 employees in unit) (*Having regard to the agreement of the parties*)

1077-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 800 (Applicant) v. Ed Mirvish Enterprises Limited operating as the Princess of Wales Theatre (Respondent)

Unit: "all wig, makeup and hairstylist employees of Ed Mirvish Enterprises Limited operating as the Princess of Wales Theatre in the Municipality of Metropolitan Toronto, save and except the Production Director, persons above the rank of Production Director and persons in bargaining units for which any trade union held bargaining rights as of June 27, 1994" (2 employees in unit) (*Having regard to the agreement of the parties*)

1082-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent)

Unit: "all employees of Wells Fargo Alarm Services of Canada Limited in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, sales staff, Branch Secretary and persons in bargaining units for which any trade union held bargaining rights as of June 28, 1994" (13 employees in unit) (*Having regard to the agreement of the parties*)

1099-94-R: Service Employees Union, Local 663 (Applicant) v. Lennox & Addington Resources for Children (Respondent)

Unit: "all employees of Lennox & Addington Resources for Children in the Village of Amherstview, save and

except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1100-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation employed at The Bay, Burlington Mall, in the City of Burlington, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

1101-94-R: Labourers’ International Union of North America - Local 607 (Applicant) v. Peter Kiewit Sons Co. Ltd. (Respondent)

Unit: “all employees of Peter Kiewit Sons Co. Ltd. in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

1102-94-R: Amalgamated Transit Union Local #966 (Applicant) v. HAGI Transit Inc. (Respondent)

Unit: “all employees of HAGI Transit Inc. in the City of Thunder Bay, save and except the Manager and persons above the rank of Manager” (8 employees in unit) (*Having regard to the agreement of the parties*)

1124-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at Air Canada Cargo Building, Lester B. Pearson International Airport, in the City of Mississauga, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

1136-94-R: International Ladies Garment Workers Union (Applicant) v. T.M.S. Marketing Inc. (Respondent)

Unit: “all warehouse employees of T.M.S. Marketing Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and technical staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

1149-94-R: Ontario Public Service Employees Union (Applicant) v. Homeward Family Shelter (Respondent)

Unit: “all employees of Homeward Family Shelter in the Municipality of Metropolitan Toronto, save and except supervisors and those above the rank of supervisor” (29 employees in unit) (*Having regard to the agreement of the parties*)

1172-94-R: International Union, United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. (Applicant) v. O.E.M. Industrial a division of 1051641 Ontario Inc. (Respondent)

Unit: “all employees of O.E.M. Industrial a division of 1051641 Ontario Inc. in the Town of Chatham, save and except forepersons, persons above the rank of foreperson and office staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

1181-94-R: Labourers’ International Union of North America, Local 1267 (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: “all driver/operators of Laidlaw Waste Systems Ltd. at 242 Cherry Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, security guards, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

1183-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Curney Mechanical Ltd. (Respondent)

Unit: “all employees of Curney Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Curney Mechanical Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Having regard to the agreement of the parties*)

1184-94-R: International Union of Operating Engineers Local 772 (Applicant) v. The Gourmet Baker Inc. (Respondent)

Unit: “all Stationary Engineers employed at The Gourmet Baker Inc.’s plant at 80-2nd Avenue in the Town of Simcoe, save and except the Chief Engineer and persons above the rank of Chief Engineer” (4 employees in unit) (*Having regard to the agreement of the parties*)

1185-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tera North Construction & Engineering Limited (Respondent)

Unit: “all employees of Tera North Construction & Engineering Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, labourers, truck drivers, carpenters and carpenters’ apprentices, employed within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (20 employees in unit)

1241-94-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Norfinch Plumbing & Heating Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Norfinch Plumbing & Heating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Norfinch Plumbing & Heating Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit)

1256-94-R: Labourers’ International Union of North America, Local 247 (Applicant) v. Russelsteel Kingston, a branch of Fedmet Inc. (Respondent)

Unit: “all employees of Russelsteel Kingston, a branch of Fedmet Inc. in the City of Kingston, save and except the supervisor, persons above the rank of supervisor, office, clerical and sales staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

1296-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. employed at its store at 7676 Tecumseh Road East in the Municipality of Windsor, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, Personnel Clerks, and students employed in a co-operative work program” (112 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0537-94-R: The Canadian Union of Educational Workers (Applicant) v. Ryerson Polytechnic University (Respondent) v. The Ryerson Faculty Association (Intervener)

Unit: "all employees of Ryerson Polytechnic University in the Continuing Education Division, in the Province of Ontario who instruct, teach, lecture, mark or grade, save and except Continuing Education Coordinators, persons above the rank of Continuing Education Coordinators, and those persons for whom the Ryerson Faculty Association held bargaining rights as of May 13, 1994" (325 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	247
Number of persons who cast ballots	133
Number of ballots marked in favour of applicant	88
Number of ballots marked against applicant	45

0623-94-R: United Steelworkers of America (Applicant) v. Ottawa Civic Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all employees of the Ottawa Civic Hospital including Operating Engineers, Firemen, Lock Smiths, Technicians, Mechanics, Helpers, Plumbers, Mechanic Fitters, Electricians, Machinists, Apprentices to a licensed trade and all trainees in the employment of the departments of physical plant as set out in I.U.O.E. 796 salary scales in the collective agreement" (45 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of ballots marked in favour of applicant	32
Number of ballots marked in favour of intervener	5

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0421-94-R: International Brotherhood of Electrical Workers (Applicant) v. Tectrol Inc. (Respondent) v. Tectrol Employee Association (Intervener)

Unit: "all employees of Tectrol Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff and engineering and test engineering staff" (558 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	581
Number of persons who cast ballots	497
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	496
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	13
Number of ballots marked in favour of applicant	301
Number of ballots marked against applicant	183
Number of ballots segregated and not counted	1

0432-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. Whitby Hydro Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of the Whitby Hydro Electric Commission, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	20
Number of ballots marked in favour of intervener	0

0505-94-R: Service Employees International Union, Local 204 (Applicant) v. Commemorative Services of Ontario (Respondent)

Unit: "all employees of Commemorative Services of Ontario at Prospect, Mount Pleasant, Elgin Mills, Necropolis, Pinehills, Beachwood, Meadowvale, Thornton, and York Cemeteries in the Municipality of Metropolitan Toronto, Town of Richmond Hill, City of Brampton, City of Oshawa and the City of Vaughan, save and except non-working forepersons, persons above the rank of non-working foreperson, technologists, office, clerical and sales staff, patrolpersons, crematorium operators and persons for whom any trade union held bargaining rights as of May 11, 1994" (143 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	178
Number of persons who cast ballots	171
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	170
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	127
Number of ballots marked against applicant	41
Number of ballots segregated and not counted	1

0617-94-R: Canadian Union of Public Employees (Applicant) v. Carleton University (Respondent) v. Independent Canadian Transit Union (Intervener)

Unit: "all employees of Carleton University in the Regional Municipality of Ottawa-Carleton, in the Central Heating Plant employed as Stationary Engineers and persons primarily employed as their helpers, save and except the Chief Operating Officer" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	2

0753-94-R: Toronto Typographical Union No. 91-0 (Applicant) v. Multipak Ltd. (Respondent)

Unit: "all employees of Multipak Ltd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons for whom any trade union held bargaining rights as of June 1, 1994" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

2387-91-R; 2525-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent) v. The Independent Employees Association (Intervener)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0081-94-R: Office and Professional Employees International Union (Applicant) v. The Timmins District Roman Catholic Separate School Board (Respondent) v. The Association of Employees of the Timmins District Roman Catholic Separate School Board (Intervener)

Unit #1: "All employees of The Timmins District Roman Catholic Separate School Board in the Municipality of the City of Timmins, save and except managers, persons above the rank of manager, executive assistants, administrative assistants, comptrollers, payroll officers, superintendents' secretaries, executive secretaries, translators, psychometrists, speech and language pathologists, sign language interpreters, school attendance officers, pastoral workers, child and youth workers, attendants, monitors, human resources secretary, students employed during the school vacation period, students employed in co-operative work programs and persons for whom any trade union held bargaining rights as of April 8, 1994." (64 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	59
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked in favour of intervener	35

0626-94-R: Independent Canadian Transit Union (Applicant) v. Modern Building Cleaning Inc. (at Riverside Hospital, Ottawa) (Respondent)

Unit #1: "all employees of Modern Building Cleaning Inc., engaged in cleaning services at Riverside Hospital of Ottawa, Save and except forepersons, persons above the rank of foreperson, office clerical and sales staff" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	16

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0420-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent)

Unit: "all employees of Intercon Security Limited in the Municipality of Metropolitan Toronto in the Alarm Monitoring Group, Technical Services Department, Systems Installations Department, Protective Hardware Department and Data Base Department save and except supervisors and persons above the rank of supervisor, office and clerical employees, CAD operators, persons employed for not more than 24 hours per week and students employed during the school vacation" (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	1

0659-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Second Generation Furnishing Inc. (Respondent)

Unit: "all employees employed by the responding party in the City of Vaughan, save and except foremen and persons above the rank of foreman, sales and office staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	11

0711-94-R: Brewery, General and Professional Workers' Union (Applicant) v. Precisioncraft Limited (Respondent)

Unit: "all employees of Precisioncraft Limited in the City of Brampton, save and except Forepersons, persons above the rank of Foreperson, office and sales staff" (98 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	80
Number of persons who cast ballots	81
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	75
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	42

0780-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Holiday Inn, Toronto Airport (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Holiday Inn, Toronto Airport, in Etobicoke, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (95 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	115
Number of persons who cast ballots	104
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	100
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	70
Number of ballots segregated and not counted	4

Applications for Certification Withdrawn

0884-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lear Seating Canada Ltd. (Respondent)

0931-94-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Francis H.V.A.C. Services Ltd. (Respondent)

1049-94-R: Labourers International Union of North America, Local 183 (Applicant) v. Adelaide Building Services Limited and/or Adelaide Maintenance Limited and/or The Adelaide Companies (Respondents)

1147-94-R: United Steelworkers of America (Applicant) v. Consumers Distributing Inc. (Respondent)

1212-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Chatham/Kent Branch (Respondent)

1333-94-R: Smith Construction Employees' Association (Applicant) v. Smith Construction (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

4534-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent) (*Granted*)

0168-94-R: Budget Car Rental Toronto Limited (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Granted*)

0438-94-R: FPC Flexible Packaging Corporation (Applicant) v. Graphic Communications International Union, Local N-1 and Graphic Communications International Union, Local 500M (Respondents) (*Dismissed*)

0754-94-R: Toronto Typographical Union No. 91-0 (Applicant) v. Multipak Ltd. (Respondent) (*Granted*)

1025-94-R: Canadian Union of Public Employees Local 783 (Applicant) v. Cornwall General Hospital (Respondent) (*Granted*)

1083-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent) (*Granted*)

1103-94-R: Service Employees Union, Local 663 (Applicant) v. Lennox & Addington Resources for Children (Respondent) (*Granted*)

1120-94-R: Association of Allied Health Professionals: Ontario (Applicant) v. Huronia District Hospital (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2637-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Fixfast Ltd/Ltee and/or Concrete Column Clamps (c.c.c.) Ltd. and/or Bona Building & Construction Limited and/or Bona Building & Management Company Limited (Respondents) (*Endorsed Settlement*)

2982-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Sentinel Plumbing Inc. and B.F.M. Mechanical Inc. (Respondents) (*Withdrawn*)

3666-93-R; 3857-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc. Altracon Construction Limited, Gaspo Construction Limited, Ashworth Engineering Inc. (Respondents); Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Altracon Construction Limited, Gaspo Construction Limited, Pamina Construction Inc. (Respondents) (*Granted*)

3984-93-R: International Union of Operating Engineers (Applicant) v. Ro-Von Construction Limited (A.K.A. 283802 Ontario Inc.), Warren Bitulithic Limited, Towland-Hewitson Construction Limited, Ro-Von Steel Inc., Ro-Von Construction Inc. (Respondents) (*Withdrawn*)

4057-93-R: United Steelworkers of America, Local 8300 (Applicant) v. The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), Writers Guild of Canada (Respondents) (*Withdrawn*)

4380-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of IUBAC (Applicant) v. M. S. Contracting Ltd., W. Framing Limited and 818490 Ontario Inc. c.o.b. as F. T. Masonry (Respondents) (*Granted*)

0587-94-R: United Brotherhood of Carpenters and Joiners, Local 2041 (Applicant) v. Myosid Ltd. and O.V. Carpentry Ltd. (Respondents) (*Endorsed Settlement*)

0995-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vantage Electrical Services Inc. and/or Gimi Developments Inc. and/or the Gimi Construction Company Ltd. (Respondents) (*Endorsed Settlement*)

1133-94-R: International Union of Bricklayers and Allied Craftsmen, Local 28 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Metro Northern Masonry and 749514 Ontario Limited cob as D & D Masonry Co. Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3316-92-R: The Hospitality, Commercial & Service Employees Union, Local 73 (Applicant) v. 967105 Ontario Limited, c.o.b. as Sanford's Roadhouse Restaurant (Respondent) (*Dismissed*)

2637-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Fixfast Ltd/Ltee and/or Concrete Column Clamps (c.c.c.) Ltd. and/or Bona Building & Construction Limited and/or Bona Building & Management Company Limited (Respondents) (*Endorsed Settlement*)

2982-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Sentinel Plumbing Inc. and B.F.M. Mechanical Inc. (Respondents) (*Withdrawn*)

3666-93-R; 3857-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Altracon Construction Limited, Gaspo Construction Limited, Ashworth Engineering Inc. (Respondents); Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Altracon Construction Limited, Gaspo Construction Limited, Pamina Construction Inc. (Respondents) (*Granted*)

3836-93-R; 3837-93-R: The Writers Guild of Canada (Applicant) v. United Steelworkers of America, Local 8300 (Respondent); The Writers Guild of Canada (Applicant) v. The Office and Professional Employees International Union (Local 343) (Respondent) (*Withdrawn*)

3984-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ro-Von Construction Limited (A.K.A. 283802 Ontario Inc.), Warren Bitulithic Limited, Towland-Hewitson Construction Limited, Ro-Von Steel Inc., Ro-Von Construction Inc. (Respondents) (*Withdrawn*)

4380-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of IUBAC (Applicant) v. M. S. Contracting Ltd., W. Framing Limited and 818490 Ontario Inc. c.o.b. as F. T. Masonry (Respondents) (*Granted*)

0587-94-R: United Brotherhood of Carpenters and Joiners, Local 2041 (Applicant) v. Myosid Ltd. and O.V. Carpentry Ltd. (Respondents) (*Endorsed Settlement*)

0995-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vantage Electrical Services Inc. and/or Gimi Developments Inc. and/or the Gimi Construction Company Ltd. (Respondents) (*Endorsed Settlement*)

1133-94-R: International Union of Bricklayers and Allied Craftsmen, Local 28 and the Ontario Provincial

Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Metro Northern Masonry and 749514 Ontario Limited cob as D & D Masonry Co. Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

0925-94-R: United Steelworkers of America (Applicant) v. McMaster University (Respondent) (*Granted*)

0926-94-R: United Steelworkers of America (Applicant) v. Boeing Canada, De Havilland Division (Respondent) (*Granted*)

0927-94-R: United Steelworkers of America (Applicant) v. Hawker Siddeley Canada Inc. (Respondent) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

2367-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. The Board of Governors of Exhibition Place and Medieval Times Dinner & Tournament (Toronto) Inc. (Respondents) (*Granted*)

3959-93-R: Labourers' International Union of North America, Local 1089 (Applicant) v. 876764 Ontario Ltd., c.o.b. as Dale Enterprises and Best Personnel Services (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0161-94-R: Employees du Centre éducatif Soleil des Petits de Hawkesbury (Applicant) v. Mouvement Syndicat CUPE Local 1026 de Hawkesbury (Respondent) v. Centre éducatif Soleil des Petits (Intervener)

Unit: "all employees of the Centre éducatif Soleil des Petits in the Town of Hawkesbury employed as day care employees, save and except Directors, persons above the rank of Director and persons for whom any trade union held bargaining rights as of November 2, 1993" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

0436-94-R: Freida Nassas (Applicant) v. Retail, Wholesale and Department Store Union (Respondent) v. Sudbury News Service Limited (Intervener)

Unit: "all employees of Sudbury News Service Limited in the City of Sudbury, North Bay and Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation periods" (19 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	14

0574-94-R: Gloria Leat (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414, 422, 440, 448, 461, 483, 488, 1000, 1688 (Respondent) v. Catherine May Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Intervener)

Unit: "all employees of Catherine May Pharmacy Ltd. in the City of Orillia, save and except assistant manager, persons above the rank of assistant manager, head cashier, pharmacists, head beauty advisor, office and clerical staff" (20 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	15

0806-94-R: Harold Swimm (Applicant) v. Retail, Wholesale and Department Store Union (Respondent) v. Northern Uniform Service Corp. (Intervener) (*Dismissed*)

0968-94-R: Employees of Isadore Roy Limited (Applicant) v. IWA-Canada, Local 1-2693 (Respondent) v. Isadore Roy Limited (Intervener) (*Withdrawn*)

1126-94-R: Kevin Woodison (Applicant) v. Communications, Energy and Paperworkers Union of Canada (Respondent) (*Withdrawn*)

1200-94-R: Ms. Pamela Blais (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of The United Steelworkers of America, Local 414 (Retail, Wholesale and Department Store Union AFL:CIO:-CLC:) (Respondent) v. Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

2933-92-M: The Hospitality, Commercial and Service Employees Union, Local 73 (Applicant) v. 967105 Ontario Limited c.o.b. Sanfords Roadhouse Restaurant (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1377-94-U: Toronto Star Newspapers Limited (Applicant) v. Graphic Communications International Union Local N-1, Brian Fletcher, John Gillespie, Paul Singh and Tom Gough (Respondents) (*Dismissed*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1098-94-U: Canadian Union of Public Employees and its Local 3190 (Applicant) v. Larry Llewellyn and Marriott Corporation of Canada Ltd. (Respondent) (*Withdrawn*)

1168-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services at Queen's University (Respondent) (*Withdrawn*)

1294-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services at Queen's University (Respondent) (*Endorsed Settlement*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2197-92-U: International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. George and Asmussen Limited (Respondent) (*Withdrawn*)

0595-93-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Gus's Plumbing & Pump Service (Respondent) (*Withdrawn*)

0840-93-U: Centre Jubilee Centre (Applicant) v. United Steelworkers of America, Gerry Loranger, Brian Shell (Respondent) (*Dismissed*)

1075-93-U: Dave Landrey, Paul Hoevenaars, Sharol Smith, Garry Hunter, Betty Nogueira, Sandra Harron-

Triemstra (Applicants) v. London and District Service Workers Union, Local 220 AFL-CIO CLC (Respondent) v. Victoria Hospital Corporation (Intervener) (*Dismissed*)

1571-93-U: Sam Mehra (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. The Corporation of the City of Toronto (Intervener) (*Terminated*)

2546-93-U: Ontario Nurses' Association (Applicant) v. The Board of Governors of the Belleville General Hospital (Respondent) (*Granted*)

3807-93-U: Ontario Liquor Boards Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

3862-93-U: United Food & Commercial Workers International Union Locals 175 and 633 (Applicant) v. The Great Atlantic and Pacific Company of Canada Limited, the Partners of Miller Thomson, Barristers and Solicitors; Dirk Van De Kamer (Respondent) (*Dismissed*)

4036-93-U: Milan Alaica (Applicant) v. CAW-Canada Local 1524 (Respondent) (*Dismissed*)

4049-93-U: Ikbal Turker (Applicant) v. CAW-Canada Local 195, & Tamco Limited (Respondents) (*Dismissed*)

4315-93-U: Brian B. Cottrill (Applicant) v. Teamsters Local 419 (Respondent) v. Beaver Lumber Co. Ltd. (Intervener) (*Dismissed*)

0016-94-U: Calvin Brown (Applicant) v. Toronto Civic Employee Union Local 43 (Respondent) v. Corporation of the City of Toronto (Intervener) (*Dismissed*)

0063-94-U: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital, Brantford and Brantford General Hospital (Respondents) (*Withdrawn*)

0089-94-U: Professor Debra Gignac, Ms. Lenore Langs, Dr. Mark Letteri, Dr. Ruth Lavery-Medd, and Ms. Gail Walker (Applicant) v. Faculty Association (University of Windsor) (Respondent) v. Charles James, Jill Anderson, Brian Brown, Mary Chick, Deborah Dayus, Adele Duck, Kathryn Foley, Margaret Foster, Ingrid Helbing, Mary Hommel, Donna Hrecenuik, Anita Hurwitz, Barrie Jones, Dennis Knight, Mathilde McGarvey, Patricia McKay, Ann Money, Joan Ogle, Kate Parr, John R. Strickland, Lionel Walsh, Virginia Walsh (Interveners) (*Withdrawn*)

0204-94-U: United Steelworkers of America (Applicant) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Respondent) (*Dismissed*)

0274-94-U: Ed Ferneti (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) 444, 1090, 1285, 1459 (Respondent) (*Withdrawn*)

0299-94-U: Ontario Public Service Employees Union and its Local 334 (Applicant) v. Kawartha-Haliburton Children's Aid Society (Respondent) (*Withdrawn*)

0602-94-U: Laurel (Laurie) Parker (Applicant) v. CAW Local 1973 (Trim Unit) (Respondent) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

0653-94-U: International Brotherhood of Painters and Allied Trades (Applicant) v. Bradscot Construction Limited, Alberto Henriques Painting & Decorating Ltd. (Respondents) (*Withdrawn*)

0755-94-U: Jagbir S. Rai (Applicant) v. McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Ltd., Aaroport Limousine Services Ltd. and Mr. Y. Zahavy (Respondents) (*Dismissed*)

0763-94-U: Ontario Nurses' Association (Applicant) v. Mount Sinai Hospital, Ms. Bev Lanigan-Gilmour (Respondents) (*Withdrawn*)

0769-94-U: PCL Constructors Eastern Inc. (Applicant) v. International Union of Operating Engineers and its Local 793, Brian Madigan and Gordon Dowdall (Respondent) (*Withdrawn*)

0841-94-U: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Kitchener-Waterloo Record, A Division of Southam Inc. (Respondents) v. Record Mechanical Employees Association (Intervener) (*Withdrawn*)

0864-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Active Mold Plastic Products Ltd. (Respondent) (*Withdrawn*)

0890-94-U: Labourers' International Union of North America, Local 247 (Applicant) v. Crane Canada Inc. and Mr. DeWayne Gardiner, Mr. David Leger (Respondents) (*Withdrawn*)

0916-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services, Queen's University (Respondent) (*Withdrawn*)

0935-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Advanced Transportation and Distribution Service (Respondent) (*Withdrawn*)

0996-94-U: United Steelworkers of America (Applicant) v. International Discus Corporation (Respondent) (*Endorsed Settlement*)

1001-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Knight Holdings Inc., c.o.b. as Loeb Wharnccliffe (Respondent) (*Withdrawn*)

1003-94-U: Herbert L. J. Pelz (Applicant) v. Bay City Steel Company Limited and Robert Ogilvie, President (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)

1040-94-U: Laundry, Linen Drivers and Industrial Workers Union, Teamsters, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Maple Leaf Gardens Limited (Respondent) (*Withdrawn*)

1043-94-U: Paul Guimond (Applicant) v. Gordon Verdecchia (Respondent) (*Withdrawn*)

1045-94-U: Teamsters Local Union 938 (Applicant) v. Knob Hills Farms Limited (Respondent) (*Withdrawn*)

1061-94-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service (Respondent) (*Withdrawn*)

1067-94-U: Renzo Giro (Applicant) v. Labourers International Union of North America Local 183 (Respondent) (*Dismissed*)

1094-94-U: Ontario Liquor Boards Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

1105-94-U: A. Desormeaux (Applicant) v. Retail, Wholesale & Department Store Union (Respondent) (*Withdrawn*)

1112-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Amity Goodwill Industries (Respondent) (*Withdrawn*)

1127-94-U: Steve Markovic (Applicant) v. Teamsters Union Local 847, Canadian Linen Supply Ltd. (Respondents) (*Withdrawn*)

1138-94-U: Toronto Typographical Union No. 91-0 (Applicant) v. Multipak Ltd. (Respondent) (*Withdrawn*)

1152-94-U: Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. Consumers Distributing Inc. (Respondent) (*Withdrawn*)

1178-94-U: Service Employees International Union, Local 532 (Applicant) v. Heritage Green Senior Centre (Respondent) (*Withdrawn*)

1198-94-U: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. 1022472 Ontario Inc., Heritage Mechanical, DFC Mechanical Contractors Ltd. and Mette Plumbing (Respondents) (*Withdrawn*)

1246-94-U: Mrs. Gail Bourne (Applicant) v. Westside Jug City (Minden) H.O., A Division of 543577 Ont. Inc. (Respondent) (*Dismissed*)

1306-94-U: International Union of Operating Engineers (Stationary) Local 772 (Applicant) v. The Gourmet Baker Inc. (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

3581-93-M: International Association of Bridge, Structural and Ornamental Ironworkers International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

3790-93-M: United Food & Commercial Workers International Union, Locals 175 and 633 (Applicant) v. The Great Atlantic and Pacific Company of Canada Limited, The Partners of Miller Thomson, Barristers and Solicitors, Dirk Van De Kamer (Respondent) (*Withdrawn*)

0061-94-M: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital, Brantford and Brantford General Hospital (Respondents) (*Withdrawn*)

0878-94-M: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Custom Racks Limited (Respondent) (*Withdrawn*)

1137-94-M: Toronto Typographical Union No. 91-0 (Applicant) v. Multipak Ltd. (Respondent) (*Granted*)

1143-94-M: United Steelworkers of America (Applicant) v. ESF Limited c.o.b. as Tim Hortons (Respondent) (*Withdrawn*)

1190-94-M: Office and Professional Employees' International Union, Local 343 (Applicant) v. Ombudsman Ontario (Respondent) (*Granted*)

1197-94-M: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. 1022472 Ontario Inc., Heritage Mechanical, DFC Mechanical Contractors Ltd. and Mette Plumbing (Respondents) (*Withdrawn*)

1247-94-M: The Ontario Secondary School Teachers' Federation (Applicant) v. The Norfolk Board of Education, Rick Smith, Robert Scott and Donald Drinkwater (Respondents) (*Dismissed*)

1316-94-M: Retail Wholesale Canada, Canadian Service Sector Division United Steelworkers of America, Local 414 (Applicant) v. 718009 Ontario Inc. c.o.b. as Sprint Courier and Starship Courier, John Van Egmond (Respondents) (*Endorsed Settlement*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0573-94-M: Stewart Detenbeck (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414, 422, 440, 448, 461, 483, 488 1000, and 1688, Willett Foods Inc. National Grocers (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0975-94-M: Canadian Timken, Limited (Employer) v. United Steelworkers of America (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

4408-93-JD: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Groff & Associates Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (UA Local 599) (Respondents) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4127-93-OH: Wayne O'Brien (Applicant) v. The Recycler Inc., (Respondent) (*Withdrawn*)

4393-93-OH: The Ontario Public Service Employees Union on behalf of Mr. Arvid Alle, Local 633 (Applicant) v. The Ministry of Labour (Respondent) (*Withdrawn*)

1087-94-OH: Douglas F. Miskolzi (Applicant) v. Russ Banks, Alcatel Gilbertson Dr. Simcoe (Respondents) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0261-92-G; 0331-92-G; 0459-92-G; 0698-92-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ellis-Don Limited (Respondent); International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ellis-Don Limited (Respondent); International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Ellis-Don Limited (Respondent); International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

3414-92-G: International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. George and Asmusen Limited (Respondent) (*Withdrawn*)

2348-93-G; 3808-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elirpa Construction and Materials Limited (Respondent) (*Dismissed*)

2636-93-G; 2985-93-G; 3490-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Bona Building & Construction Limited and/or Bona Building & Management Company Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Concrete Column Clamps (C.C.C.) Ltd. and/or Fixfast Ltd./Ltee and/or Bona Building & Construction Limited and/or Bona Building & Management Company Limited (Respondents) (*Endorsed Settlement*)

3162-93-G: Labourers' International Union of North America on its own behalf and on behalf of Locals 491, 493 and 607 (Applicant) v. Premier-Murphy - A Joint Venture (Respondent) (*Withdrawn*)

3582-93-G: International Association of Bridge, Structural and Ornamental Ironworkers International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)

3879-93-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Launi Masonry Ltd. (Respondent) (*Endorsed Settlement*)

4512-93-G: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Thomas Fuller Construction Ltd. (Respondent) (*Endorsed Settlement*)

0503-94-G; 1035-94-G: Lake Ontario District Council United Brotherhood of Carpenters and Joiners of America (Applicant) v. H. G. Susgin Construction Ltd. (Respondent) (*Endorsed Settlement*)

0517-94-G: Construction Workers Local 53, CLAC (Applicant) v. Rauth Roofing Limited (Respondent) (*Withdrawn*)

0588-94-G; 1092-94-G: United Brotherhood of Carpenters and Joiners, Local 2041 (Applicant) v. Myosid Ltd. and O. V. Carpentry Ltd. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Myosid Ltd. and O.V. Carpentry Limited (Respondents) (*Endorsed Settlement*)

0595-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. CPP Plumbing Limited (Respondent) (*Granted*)

0615-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fersil Masonry Ltd. (Respondent) (*Withdrawn*)

0654-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. P A Richens Carpentry (Respondent) (*Endorsed Settlement*)

0679-94-G; 0770-94-G: International Union of Operating Engineers and its Local 793 (Applicant) v. PCL Constructors Eastern Inc. (Respondent); PCL Constructors Eastern Inc. (Applicant) v. International Union of Operating Engineers and its Local 793 (Respondent) (*Withdrawn*)

0790-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Aspen Interiors Systems Ltd. (Respondent) (*Endorsed Settlement*)

0836-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Regional Network Contractors Ltd. (Respondent) (*Endorsed Settlement*)

0952-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Presidentes Masonry (Respondent) (*Withdrawn*)

0953-94-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Withdrawn*)

0963-94-G: Labourers' International Union of North America and Labourers' International Union of North America, Local 183 (Applicant) v. Apex Services, A Division of 226023 Holdings Ltd. (Respondent) (*Endorsed Settlement*)

0988-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Skyline Construction Masonry Limited (Respondent) (*Granted*)

1000-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lumar Construction Ltd. (Respondent) (*Endorsed Settlement*)

1002-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicants) v. Ste-Alco Inc. (Respondent) (*Endorsed Settlement*)

1022-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Locals 700, 721 and 736 (Applicant) v. Calorific Construction Limited (Respondent) (*Endorsed Settlement*)

1030-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. La Rinascente Masonry Ltd. (Respondent) (*Granted*)

1036-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Downsview Drywall (Respondent) (*Endorsed Settlement*)

1053-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Refcon Systems Inc. (Respondent) (*Withdrawn*)

1055-94-G; 1057-94-G; 1058-94-G; 1059-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Colborne Mechanical Inc. (Respondent) (*Endorsed Settlement*)

1068-94-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bruce S. Evans Limited (Respondent) (*Withdrawn*)

1069-94-G: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 (Restoration Steeplejacks) (Applicant) v. Vulcan Method Waterproofing & General Contracting Inc. (Respondent) (*Endorsed Settlement*)

1080-94-G: Labourers' International Union of North America, Local 527 (Applicant) v. Premier Cable Construction (Respondent) (*Withdrawn*)

1081-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Pelbro Drywall Co. Limited (Respondent) (*Endorsed Settlement*)

1095-94-G: United Brotherhood of Carpenters and Joiners of America Lake Ontario District Council (Applicant) v. Banforming 1991 Inc. and 912459 Ontario Ltd. o/a Banform Construction (Respondents) (*Endorsed Settlement*)

1132-94-G: International Union of Bricklayers and Allied Craftsmen, Local 28 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Metro Northern Masonry and 749514 Ontario Limited cob as D & D Masonry Co. Ltd. (Respondents) (*Withdrawn*)

1134-94-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Internorth Construction Company Ltd. (Respondent) (*Endorsed Settlement*)

1155-94-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Niagara Air Systems (Respondent) (*Endorsed Settlement*)

1156-94-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) (*Withdrawn*)

1157-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dome Carpets Limited (Respondent) (*Withdrawn*)

1158-94-G: Sheet Metal Workers' International Association Local 30 (Applicant) v. Dufferin Roofing (Respondent) (*Withdrawn*)

1159-94-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. Dufferin Roofing (Respondent) (*Withdrawn*)

1186-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. David's (Grovedale) Construction Ltd. (Respondent) (*Withdrawn*)

1188-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Blenkhorn and Sawle Limited (Respondent) (*Withdrawn*)

1196-94-G: United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local Union 46 (Applicant) v. Zentil Plumbing & Heating Service Department Ltd. (Respondent) (*Withdrawn*)

1209-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Level Installation Systems (Respondent) (*Withdrawn*)

1218-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Stratos Construction Ltd. (Respondent) (*Endorsed Settlement*)

1240-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Tri-Krete Limited (Respondent) (*Endorsed Settlement*)

1245-94-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Tap Masonry Limited (Respondent) (*Endorsed Settlement*)

1258-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Mega Masonry Inc. (Respondent) (*Withdrawn*)

1259-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Michelin Group Inc. (Respondent) (*Withdrawn*)

1261-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Pulsoni & Son Masonry Ltd. (Respondent) (*Withdrawn*)

1279-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Carlane Masonry (594375 Ontario Inc.) (Respondent) (*Withdrawn*)

1288-94-G: Teamsters Local Union No. 230 Affiliated with the International Brotherhood of Teamsters (Applicant) v. Active Excavating and Contracting (1985) Ltd. (Respondent) (*Endorsed Settlement*)

1298-94-G: Labourers' International Union of Canada, Local 183 (Applicant) v. Crossline Masonry Contracting Inc. (Respondent) (*Withdrawn*)

1300-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. All Ontario Masonry (Respondent) (*Withdrawn*)

1301-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. 696147 Ontario Inc. (Willowdale Masonry) (Respondent) (*Withdrawn*)

1313-94-G: Labourers' International Union of North America, Local 607 (Applicant) v. Arosan Enterprises Ltd. (Respondent) (*Withdrawn*)

1345-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Shiplake Management Co. (Respondent) (*Withdrawn*)

1369-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Man-Co Construction Ltd. (Respondent) (*Withdrawn*)

1401-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Natolin Construction (Respondent) (*Endorsed Settlement*)

1404-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bre-Ex Limited (Respondent) (*Withdrawn*)

1448-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Peel Masonry (Respondent) (*Withdrawn*)

1456-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pro-Con Paving & Concrete Ltd. (Respondent) (*Endorsed Settlement*)

1500-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Chalkboard Installation (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0495-91-R: The Independent Employees Association (Applicant) v. Lodder Brothers Limited (Respondent) (*Denied*)

2029-91-G: Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ellis-Don Limited (Respondent) (*Dismissed*)

2980-93-U: Marinko Mesic (Applicant) v. Local 795 - Energy & Chemical Workers Union (Respondent) v. Centra Gas Ontario Inc. (Intervener) (*Dismissed*)

3443-93-R: United Steelworkers of America (Applicant) v. Roy Ayranto Sales Limited (Respondent) v. Group of Employees (Objectors) (*Denied*)

RIGHT OF ACCESS — PICKETING

3703-93-M: The Great Atlantic & Pacific Company of Canada, Limited (Applicant) v. United Food & Commercial Workers International Union, Locals 175 and 633 and Shelly Fair Service, Scott Constable, Peggy Swift and Gary Dimock (Respondent) (*Granted*)

3839-93-M: The Great Atlantic & Pacific Company of Canada, Limited (Applicant) v. United Food & Commercial Workers International Union, Locals 175 and 633, Walter Marshall, Owen Hayes, Allan Mackie, Helen Hope (Respondents) (*Dismissed*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

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ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

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EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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BEFORE: *K. G. O'Neil*, Vice-Chair.

APPEARANCES: *Brian Shell* and *George Ross* for the applicant; *W. J. Hayter* and *Arthur Tarasuk* for the responding party.

DECISION OF THE BOARD September 23, 1994

1. This is an application for interim relief under section 92.1 of the *Labour Relations Act*. It is related both to an interim order made on July 28, 1994 in the certification matter between these two parties in Board File No. 0262-94-R and to two pending matters, an application alleging a violation of sections 67(a), 71, 81(2) and 82(1) and a related consent to prosecute which bear the Board File Nos. 1884-94-U and 1885-94-U. The union is asking its chief inside organizer Carolyn Rutetzki to be reinstated to her position in the office and for a posting to employees.

2. A brief background is necessary to understand the current application. The union applied for certification on April 25, 1994. There were many issues in dispute between the parties which necessitated a long hearing. A final order of the Board issued on August 19, 1994 certifying the union. The Board also found that Ms. Rutetzki, the key inside organizer of the applicant, was an employee for the purposes of the Act, as she did not exercise managerial duties and was not employed in a position confidential as to labour relations.

3. During the course of the hearing that led to the August 19, 1994 decision, an accommodation was made between the parties to the effect that Ms. Rutetzki would be scheduled as a cashier during the hearing, rather than her normal duties as at the date of application which were primarily office duties. When the hearing became protracted, other issues arose as to the assignment of Ms. Rutetzki and the Board was asked to make directions as to her assignment. The Board did so on July 28, at which time it endorsed the record to the effect that the employer would be entitled to assign Ms. Rutetzki as a cashier with a cashier's schedule, until the Board's decision was released, with certain conditions. One of those was as follows:

As of the date of my decision (which may be given with reasons to follow at a later date), Ms. Rutetzki will be reinstated to her duties in the office as they existed prior to the application date, unless otherwise directed by the Board or agreed between the employer and the union.

4. When the August 19 decision was released, the Board found that Ms. Rutetzki was in the bargaining unit and did not order any variation to the July 28 order as to the assignment of Ms. Rutetzki. Counsel for the union Paula Turtle then faxed letters to counsel for the responding party on the certification matter, Arthur Tarasuk, asking for Ms. Rutetzki's immediate reassignment to the office. Counsel for the employer did not respond directly to those letters, but rather spoke to a staff representative of the union, Ms. Turtle's client. What exactly took place between Mr. Tarasuk and Mr. Ross is the matter of factual dispute and may be required to be determined in the

main matters that are still pending. It is not appropriate for determination in the context of an application for interim relief. However, there are certain aspects that are not in dispute. It is common ground that Mr. Tarasuk and Mr. Ross had a conversation on Saturday, August 27, 1994, during which they came to an agreement to postpone further discussion about Ms. Rutetzki's situation until after Mr. Tarasuk returned from vacation after the Labour Day weekend. Mr. Tarasuk's declaration is to the effect that that agreement contained both an agreement to extend the assignment of Ms. Rutetzki as a cashier and an undertaking to further discuss the matter after Labour Day. By contrast, Mr. Ross declares that all he was agreeing to was to put a hold on further discussions until after Labour Day, and that he did not agree to anything contradictory to the Board's order.

5. On August 29, 1994, Mr. Tarasuk wrote a letter to Mr. George Ross with a copy to counsel for the union which states its purpose as follows:

"to confirm our agreement to extend the arrangement that had been established before the Labour Relations Board that Ms. Carolyn Rutetzki would continue to operate in the capacity as a cashier until I return to our respective offices following Labour Day. This is also to confirm that upon our respective returns, we will discuss and consider extending the arrangement with respect to Ms. Rutetzki until negotiations, and that we could possibly arrive at some more permanent solution in the course of negotiations".

6. On August 30, 1994, Ms. Turtle wrote a letter to Mr. Tarasuk which reads as follows:

I acknowledge receipt, at 4:45 p.m. on August 29, 1994 of a copy of your letter which purports to reiterate the terms of an agreement with Mr. George Ross, National Representative of the United Steelworkers of America. Upon receipt of your letter I spoke to George Ross whom I understand you contacted on Saturday morning.

Your conduct in contacting my client directly when you had received three faxed letters from me dated August 23, 25 and 26, 1994 respecting the very matter you purported to discuss with my client violates Rule 14 of the Code of Professional Conduct, a copy of which I enclose for your reference. I draw your attention in particular to commentary 7.

I am advised by Mr. Ross that you mischaracterized to him the issues which you allege were discussed during your brief Saturday morning telephone conversation. You did not advise Mr. Ross that Ms. Rutetzki was a key union supporter and you did not advise Mr. Ross that Ms. Rutetzki was the subject of an outstanding Board order dated July 28, 1994 directing her reinstatement to her old job duties upon release of the Board's decision. You suggested to Mr. Ross that the issue of her "confidential" status was still outstanding, although the Board had issued a decision dated August 19, 1994 finding that she was *not* employed in a confidential capacity in matters respecting labour relations. You also suggested to Mr. Ross that she would be given even more confidential duties in the future.

Mr. Ross understood that you were seeking an agreement to delay further discussions about what you characterized as the outstanding issue of Ms. Rutetzki's confidential status. Mr. Ross did not authorize or agree to delay the reinstatement of Ms. Rutetzki to her duties as they existed prior to the application for certification. Furthermore, Mr. Ross at no time agreed to "discuss and consider extending the arrangement with respect to Ms. Rutetzki until negotiations and that we could possibly arrive at some more permanent solution in the course of negotiations".

You have flagrantly disregarded the Rules of Professional Conduct and you have mischaracterized the facts and circumstances surrounding Ms. Rutetzki's status in the course of obtaining with my client directly the alleged "agreement" described in your letter dated August 29, 1994. I reiterate that no such agreement exists. The union demands that your client reinstates Ms. jH jMRutetzki to her formerly held position *immediately* in accordance with the Board's order dated July 28, 1994.

Any future discussions regarding this matter should take place with counsel directly and not through Mr. Ross.

7. Apparently a letter of September 1, 1994 passed between the parties (presumably from Mr. Tarasuk's office) which is not part of the record. That was responded to on September 6, 1994 by the following letter from Ms. Turtle to Mr. Tarasuk:

Please be advised that my letter dated August 30, 1994 was sent on Mr. Ross' instructions. The last sentence of that letter was clear in stating that all dealings regarding Ms. Rutetzki and the Board's directions should take place through counsel only. In response to the last sentence of Ms. Wilford's letter of September 1, 1994 wherein you assert that you intend to deal with Mr. Ross unless instructed otherwise, please consider yourself "instructed otherwise" and govern yourself accordingly.

8. As of September 22, 1994, the date of the hearing of this application, Ms. Rutetzki had not been reinstated to any of her duties in the office. The pending allegations include the assertion that this fact was motivated by anti-union animus and a breach of the statutory freeze.

9. The material before the Board on this application included declarations from Carolyn Rutetzki, the employee in question, Wes Dowsett and George Ross, union staff members and from Mr. Tarasuk, as noted above, employer counsel on the certification application. The employer took the position that the matter should be decided without reference to Mr. Ross' declaration as the initial application for interim relief had not referred to any agreement, and had not sought to rely on Mr. Ross' declaration, which indeed did not exist on the date of the other declarations relied on in the application. However, counsel acknowledges that his client had the declaration prior to the drafting of Mr. Tarasuk's declaration as that declaration seeks to refute it. Subsequent correspondence made it clear that the applicant intended to rely on Mr. Ross' declaration. In the circumstances of the case, we are of the view it would be unduly technical to not consider all of the material before us, including the declaration of Mr. Ross.

10. The parties were agreed that, in order to grant interim relief pursuant to section 92.1 of the Act, the Board must determine that there exists an arguable case of a breach of the Act and that the balance of harm from a labour relations standpoint favours the granting of interim relief. See, among others, *Loeb Highland*, [1993] OLRB Rep. March 197, *Reynolds Lemmerz Industries*, [1993] OLRB Rep. March 242, *Morrison Meat Packers*, [1993] OLRB Rep. April 358, *Tate Andale Inc.*, [1993] OLRB Rep. Mar. 254.

11. The employer disputed the existence of an arguable case only to the extent it asserted that it was based on erroneous facts. We are of the view that an arguable case for the relief sought has been set out in the main matters, assuming the facts to be true and provable which is the appropriate standard on an application for interim relief.

12. We are also of the view that the balance of harm from a labour relations standpoint favours the granting of interim relief. The reasons for this conclusion follow.

13. The responding party argued that we should not disturb the status quo, either as a matter of compliance with the Board's order or as an exercise of the Board's powers to grant interim relief in that there had been an agreement which had picked up on the wording in the Board's July 28 order "unless otherwise agreed between the employer and the union". It is asserted that it would do considerable labour relations damage to allow the union to resile from that agreement.

14. The union on the other hand strenuously objects to the characterization of the facts as

showing any agreement as to the subject matter of the Board's order at any time, but in particular after September 6, 1994.

15. We have reviewed the material before us on this application, and based only on the facts that are not in dispute between the parties, the Board is of the view that as of the date of September 6, 1994, the result is that the Board's order was not being complied with, and there was no agreement to the contrary between the parties, nor had there been a Board direction to the contrary. The facts relied by the employer, at their highest, speak only to a purported agreement to extend the arrangement to September 6. Since the undisputed facts disclose no agreement to assign Ms. Rutetzki outside the office after September 6, 1994, the argument about allowing the union to resile is not a persuasive argument on the facts of this case.

16. The labour relations harm of leaving a Board order in a state of non-compliance is considerable, as both parties need to know that orders of the Board, the statutory tribunal which is their recourse in cases of dispute over some of the most basic issues in collective bargaining, will be complied with. This is so regardless of what the intention of the employer was in not reinstating Ms. Rutetzki to the office, which is something that remains to be determined, if necessary, as part of the pending matters. There is nothing in the material which suggests any harm to the employer if Ms. Rutetzki is returned to the office which would, in our view, outweigh the labour relations damage of leaving Board orders in a state of non-compliance.

17. The employer also argued that the agreement was "we are going to talk about what the employer sees as a problem", and that the union is clearly in breach of that agreement because it has said they will not talk to the employer about Ms. Rutetzki's duties. The Board is urged to decline to give the union the order it requested and instead order the union to discuss the issue. Counsel for the union confirmed at the hearing of this application for interim relief that they were willing to discuss any and all matters germane to labour relations. For reasons outlined below, however, the Board is of the view that the situation as of the application date is the appropriate starting point for such discussions.

18. The employer argued that the status quo was that Ms. Rutetzki was a cashier, and that that is the point of departure from which the Board's response should be measured. With respect the Board cannot agree. The accommodation made to allow the employer to assign Ms. Rutetzki as a cashier during the ongoing hearings was an exceptional one. Normally, a certification hearing would not have involved the key organizer having any change in her regular duties, and she would merely have been given leave on an intermittent basis to come to the hearings. Thus the period of the accommodation of the employer's wishes which involved the change in Ms. Rutetzki's duties to cashier must be seen as the departure and the normal situation to be that she was working in the office.

19. It is a basic principle of the labour relations scheme in Ontario that the collective bargaining relationship should commence on a footing which preserves the status quo, to the extent possible, as at the application date. This is to protect both the interest of the employer in stability during a time of change in the relationship with its employees, and the interest of both parties in having a recognizable starting point for negotiations. The scheme of the Act and the Board's jurisprudence also include the considerations to which Mr. Shell made reference in argument, that any change in the treatment of an employee at work who has been visible in the organizing drive may lead to perceptions on the part of other employees that that organizer is being singled out. This can cause the further labour relations harm of undermining the legitimate authority and employee support of the union. It is important to underline that this is not to be taken as a comment on the motivation of the employer as there are issues to be determined in the main matters related to that.

Rather, it is to highlight that underlying the Board's July 28 order and the decision not to vary it in its August 19 decision, was the idea that the status quo as of the date of application was the appropriate framework for the parties' relationship while the issues surrounding and flowing from the certification process are dealt with.

20. We have carefully considered the other considerations which were contained in Mr. Tarasuk's declaration and counsel's submissions and do not find that they indicate the relief requested should not be granted.

21. The employer argued that it would only be a short time before the main matters were determined, giving all the more reason to leave things as they were. However, the fact of the matter is that the length of the litigation between these parties on the pending matters is a matter of considerable uncertainty and cannot be presumed to be something that will be finished in the short term, even though it is scheduled to start on October 20, 1994.

22. The employer also argued that, since the Board's August 19 final decision recognized that Ms. Rutetzki exercised some supervisory duties and was exposed to financial information that might be confidential, it was recognizing that she was in a conflict of interest position. Counsel argued she should therefore be kept out of the office until the parties can negotiate further about her situation. The Board's decision of August 19 finds that it is appropriate that she be in the bargaining unit, i.e. evidence of her duties and responsibilities in the office did not disclose any conflict of interest which would require her to be excluded from the bargaining unit. Absent agreement, which there clearly was not by the time of the hearing on September 22, there is no sufficient reason in the material before the Board to keep Ms. Rutetzki out of the office.

23. As a matter of accommodation of the employer, the union said during the hearing of this application for interim relief that it would be content if Ms. Rutetzki were to return to the office with her duties as at the date of application with the exception that neither she nor any other bargaining unit employee would work on accounts payable and accounts receivable until such time as the main matters are disposed of. In answer to a question from the Board, the employer took the position that, although it did not think Mr. Rutetzki should be reinstated to the office, if the Board were inclined to reinstate her, it would prefer to have it with that condition than without it. Given that exchange of positions, the Board is willing to modify its order of July 28 to the extent that Ms. Rutetzki is to be returned to the office with her duties as they were as of the date of application with the exception that the employer will be entitled to decline to assign her duties with respect to accounts payable and accounts receivable. If it does not assign them to Ms. Rutetzki, they are not to be assigned to someone else in the bargaining unit. It should be made clear that reassignment to the office should include Ms. Rutetzki's normal office schedule.

24. This application for interim relief has the unusual feature of involving a previous Board order which had its genesis, not in the pending matters, but completed matters. In these circumstances, it does not seem appropriate to specify an "end date" for the Board's order. However, any Board decision in the main matters or resolution by the parties may effect a change to the status quo after the Board's order.

25. It was suggested by employer counsel that any order reinstating Mr. Rutetzki to the office should be stayed until the return of his clients, Mr. and Mrs. Bannerman, from a convention in Winnipeg on or about September 28, 1994. It is not appropriate to defer the implementation of the Board's order and arrangements should be made to comply whether or not the Bannermans are in Kirkland Lake.

26. For all the reasons above, the Board orders

- a) Ms. Rutetzki is to be reinstated forthwith to her duties in the office as they existed prior to the application date with the understanding that the employer will be entitled to decline to assign her duties with respect to accounts payable and accounts receivable, but that if it does not assign them to Ms. Rutetzki they will not be assigned to someone else in the bargaining unit.
- b) the Board notice as set out in Appendix A is to be posted in conspicuous places in the workplace and remain there for sixty (60) days or until the disposition or resolution of Board files 1884-94-U and 1885-94-U.

27. The Board remains seized of this matter to deal with any issues that may arise out of its implementation.

3369-91-U Arthur Chen, Applicant v. Local 43 Metro Toronto Civic Employees Union CUPE Affiliate, Respondent v. The City of Toronto, Intervenor

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employee alleging violation of union's duty of fair representation based on a refusal to arbitrate his overtime grievance, an allegedly improperly worded grievance regarding sick days, and the failure of the union to consult him regarding a transfer - At the close of employee's case and at vice-chair's request, employee making argument - Board not satisfied that section 69 of the Act violated and dismissing application

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Arthur Chen* on his own behalf; *Mark Wright* for the responding party; *David Bannon* and *Georgina Husvar* for the intervenor.

DECISION OF THE BOARD September 12, 1994

1. This is an application brought under section 89 [now 91] of the *Labour Relations Act* ("the Act"). The applicant alleges that the responding party (hereinafter "the union") has acted in a manner which violates section 68 [now 69] of the Act.
2. This matter came on before me for hearing on August 11 and 16, 1994. On August 16, 1994, I issued the following brief oral decision:

I have heard the evidence of Mr. Chen and, at the close of his case and at my request, I have heard Mr. Chen's argument on the evidence before me. In my view, the evidence before me does not substantiate that s.68 [now s.69] of the Act has been violated. Accordingly, I am dismissing this application. Written reasons will follow.

These are those reasons.

3. At the outset of the hearing, I observed that Mr. Chen was not represented by counsel. By way of decision dated June 13, 1994, I had granted Mr. Chen an adjournment of the hearing of

this matter as a result of the rather abrupt departure of his legal counsel shortly before the scheduled hearing dates. Mr. Chen advised upon the resumption of the hearing that he had made efforts to retain another representative but found that the individual he desired to retain was too busy to take on his case. I advised Mr. Chen that it was appropriate for him to appear unrepresented before the Board, as many people do. However, I advised Mr. Chen that, as the Vice-Chair deciding this case, I was not in the position to guide Mr. Chen respecting such matters as what evidence to call and how it should be presented. I did indicate that I would outline for Mr. Chen, as the case developed, certain procedural matters. Mr. Chen indicated that he understood that the risk of attending without counsel was to be borne by him.

4. During the course of the hearing, a number of objections were raised by counsel regarding the evidence offered by Mr. Chen. The initial complaint, dated January 22, 1992, was somewhat lacking in particulars. By decision dated September 1, 1992 the Board (differently constituted) ordered Mr. Chen to provide particulars of the allegations raised in the complaint. The solicitors then acting for Mr. Chen provided the other parties and the Board with particulars under cover of letter dated October 9, 1992. Counsel for the union at that time requested further particulars of certain allegations. Again, the Board (differently constituted) determined that any further particulars would be ordered by the panel hearing this case on its merits, should it be determined to be necessary.

5. Through no fault of the applicant, this complaint was not scheduled for hearing until May, 1994. The hearing was adjourned to a hearing date in June, 1994, at which time I dealt with a number of preliminary motions. As a result of the motions brought, I ordered certain paragraphs struck from the complaint and/or particulars. Many of the struck paragraphs consisted of general statements alleging various human rights violations by Harold Smith, Business Agent of the union. For reasons outlined in the decision dated June 13, 1994, I determined that it was inappropriate to entertain evidence on these allegations.

6. During the hearing of this matter on its merits, Mr. Chen offered evidence on numerous occasions relating to these human rights allegations and other allegations which had been struck from the complaint. As a general observation, when this evidence was presented I told Mr. Chen that the evidence was unhelpful and irrelevant. However, in order to avoid numerous, time-consuming objections, I advised counsel for both the union and the City of Toronto ("the City") that I would only consider the relevant evidence before me for the purposes of determining this application. This I have done.

7. During the course of the hearing in June, 1994, Mr. Chen indicated that he possessed a number of documents that he wished to place into evidence. By way of the June 13, 1994 preliminary decision, I ordered that Mr. Chen provide the other parties (and file with the Board) copies of any documents that he would be relying upon for the purposes of this hearing, not later than August 4, 1994. At the outset of the hearing on August 11, 1994, I asked counsel for the union and counsel for the City whether they had received any such documents. Both responded in the negative. Mr. Chen indicated that he did, in fact, have a number of documents which he still desired to utilize in support of his claims. He could provide no excuse for not forwarding copies as previously ordered.

8. Counsel reviewed all documents to determine whether an objection would be taken to the admission of some or all of these documents into evidence. Ultimately, counsel objected to the admission of all but a few of the documents. After hearing the submissions of all parties, I permitted only 3 of the documents to be placed into evidence, excluding all others. Most of the documents were either 'already before the Board (in a bound volume filed by the union) or were per-

sonal notes which could not have been anticipated by the union or the City, and which would require an adjournment to fully review and consider. In the circumstances of this case, I felt it appropriate to exclude all documents that could, in any way, take either the union or the City by surprise.

9. This ruling caused some distress to Mr. Chen, as he frequently attempted to make reference to some of the excluded notes during the course of testimony. Some latitude was granted to Mr. Chen in that regard, but when it became clear that he was relying exclusively on his notes during testimony Mr. Chen was asked to refrain from referring to them. Mr. Chen expressed the view that the truth would be better discovered if these notes were entered into evidence. As I explained to Mr. Chen during the hearing, there is some legitimacy to his view that the truth would be better discovered if all of his documents were entered into evidence. However, there are, as always, countervailing interests to consider. In this case, this complaint is 2 1/2 years old and a further adjournment to permit the union and the City to consider Mr. Chen's notes was not appropriate, especially in light of the fact that Mr. Chen had previously been ordered to produce the documents prior to the hearing.

10. Turning to the merits of this complaint, Mr. Chen has, essentially, three complaints against the union which he alleges constitute violations of s. 68 [now s. 69] of the Act. In substance, they are as follows:

- (a) the union refused to arbitrate an overtime grievance and "withdrew" it on four separate occasions;
- (b) the union filed an improperly-worded grievance relating to 53 sick days that he claims that he was deprived of; and
- (c) the union, through Mr. Harold Smith, did not consult him regarding a transfer from the Purchasing and Supply Department of the City.

As noted above, the Board heard the evidence of Mr. Chen on these matters, and his evidence is set out directly below.

11. With respect to his overtime grievance, Mr. Chen alleges that the union ought to have arbitrated this grievance against the City. At the relevant times in 1989 Mr. Chen was employed by the City as a watchman. The evidence disclosed that Mr. Chen verbally complained about an unequal amount of overtime being given to other watchmen in 1988 and was subsequently provided an opportunity for greater overtime compensation over the holiday season in 1988. It was Mr. Chen's evidence that during discussions on this matter his co-ordinator had produced a "false printout" of overtime, which printout was eventually shown to be inaccurate by the union. There was no evidence to the contrary.

12. Mr. Chen was of the view, in or around August, 1989, that he was once again not being afforded adequate opportunities for overtime. He attributed this to supervisory harassment and as a reprisal for his earlier complaint. A grievance was filed. During the grievance steps, the City provided the union with a printout showing that, to that date, Mr. Chen had worked more overtime than his coworkers. Mr. Chen's own notes, based on his analysis of attendance sheets and a work schedule, were strikingly different and painted an opposite picture.

13. Ultimately, Mr. Chen was asked to attend at the offices of the solicitors for Local 43 to explain the situation. He met with an articling student and put forward his position. Mr. Chen stated that the meeting was not particularly long and that he was quite emotional during the meet-

ing. Counsel for Local 43 eventually provided an opinion letter to the union dated April 17, 1990, in which it was stated that the grievance was unlikely to succeed at arbitration unless some proof existed that the City's printout was erroneous and that no such proof existed at that date.

14. Between April, 1990 and November, 1991, Mr. Chen's grievance was slated to be formally withdrawn by the union at 4 separate general meetings. On each of the first three occasions, the grievance was not withdrawn as a result of Mr. Chen's efforts to keep his grievance alive. In May, 1991, Mr. Chen once again met with Local 43's solicitors in order to weigh the possibility of success should the case proceed to arbitration. No opinion letter was rendered as a result of this meeting, but Mr. Chen alleged that the lawyer that he spoke to told him that he had "a good case".

15. Eventually, in November, 1991, Mr. Chen's grievance was formally withdrawn by the union's Executive Board. Mr. Chen was provided with an opportunity to address the Executive Board prior to the withdrawal. He was advised that, should he not be happy with the union's decision, he could complain to the Labour Relations Board. Mr. Chen attended the next general meeting of the union and tried to speak to his grievance. He was not permitted to "have the floor" to speak to his grievance as he was ruled out-of-order.

16. It is on the basis of these facts that Mr. Chen states that s.68 [now s.69] of the Act has been violated. Quite simply, there is no evidence at all that the union has acted inappropriately. It is true that the union had scheduled the withdrawal of Mr. Chen's grievance three times prior to November, 1991. However, the first of these times was subsequent to the receipt of the opinion letter from counsel (which concluded no success should the grievance be arbitrated). The other times that the grievance was scheduled to be withdrawn were, in my view, simply reflective of the opinion letter, each time the withdrawal being deferred due to the persuasive nature of Mr. Chen's request. In my view, merely because the union "changed its mind" on various occasions regarding the disposition of a grievance does not support a claim that s. 68 [now s.69] of the Act has been violated.

17. Nor does the withdrawal of this grievance itself support such a claim. The opinion of the union's law firm is reflected by the letter dated April 17, 1990. The union never received any letter qualifying that opinion. The mere assertion by Mr. Chen that the lawyer he saw in May, 1991, felt that he had "a good case" does not alter my conclusion. Having observed Mr. Chen as a witness, I must say that I am not satisfied, notwithstanding that this testimony was not contradicted, that the lawyer in question *did* state that this was "a good case". It was apparent from the testimony of Mr. Chen that he often "grasps" certain words or phrases used by others, to the exclusion of all other words used, to justify the position taken by him on certain issues. I have some real doubt, therefore, of what the lawyer actually said to Mr. Chen. However, even on the assumption that the lawyer *did* say to Mr. Chen that he felt there was a "good case", the union acted on the written legal opinion offered by a senior, respected labour counsel and, in my view, cannot be criticized for doing so. There is no evidence before me to suggest that *the union* was ever advised that Mr. Chen had "a good case". Accordingly, this branch of the complaint is dismissed.

18. With respect to the second grievance, the events in question arose out of what was rather mischievously referred to in Mr. Chen's particulars as a "satirical comment" made to a coworker in March, 1990. Mr. Chen testified that on March 2, 1990, he commented to a coworker, regarding his overtime situation, that he had "gone the legal channels" and asked whether it was necessary "to buy a gun and shoot someone". This comment was reported to management, and then the police, which arrested Mr. Chen at his home, charged him with uttering a death threat,

and imprisoned him for four days. Ultimately, on June 27, 1990, the charges were withdrawn by the Crown.

19. The court had ordered that Mr. Chen not attend at the work place pending disposition of the charge. Accordingly, Mr. Chen was provided with sick pay (equivalent to 100% of his salary) for 53 days. The sick pay was drawn from Mr. Chen's sick bank. Mr. Chen filed a grievance on April 27, 1990, claiming that "management failed to reimburse Arthur Chen for legal expenses incurred as a result of a criminal charge which was subsequently withdrawn".

20. The legal fees incurred by Mr. Chen for representation regarding the criminal charges totalled \$1,000.00. During the grievance procedure the City agreed to pay Mr. Chen for this expense (although it is not apparent to me that it was obliged under the collective agreement to do so). The City specifically refused to compensate Mr. Chen for his 53 sick days on the basis that he had not incurred any loss. Ultimately, the union considered the grievance as resolved and withdrew it.

21. Mr. Chen complains that Mr. Smith improperly drafted the grievance, and that this constitutes a violation of s. 68 [now s. 69] of the Act. This proposition is entirely without merit. The grievance form does not specifically state that Mr. Chen wanted compensation for any "sick days" lost due to his predicament, but it is abundantly clear from the record that the City understood at all times that that was what Mr. Chen (and the union) had claimed. Mr. Chen acknowledged as much in response to a series of questions that I put to him. It is hard to believe that the union could be said to have failed to properly represent Mr. Chen in these circumstances, particularly when one considers (in my view, at least) that the wording of the collective agreement on its face does not support Mr. Chen on either the claim for the 53 sick days *or* the legal fees, which he ultimately recovered.

22. With regard to the allegation made in the particulars that the union failed in its statutory duty by failing to inform Mr. Chen of his right to file a grievance against the City for "discrimination and harassment" for their actions (in calling the police and precipitating his imprisonment), I disagree with this proposition. There is no suggestion that Mr. Chen made inquiries regarding such a right which were ignored by the union. Assuming, for the purposes of this decision that such a right covering these circumstances exists in the collective agreement, it is not evident to me that the union has an obligation to inform a worker, such as Mr. Chen, of "his rights" in a proactive manner. Mr. Chen is quite capable of formulating his own claims should he so desire and the union is not obligated to do so independently of a request by him.

23. More importantly, however, I am of the view that it would not have been clear to the union in the circumstances that management *had* acted inappropriately towards Mr. Chen. Mr. Chen admitted making his "satirical comment" to a coworker. Assuming that the comment was as innocuous as described by Mr. Chen, one would expect that some contact with police might be warranted. Their response to the situation is beyond the control of the City and the union. In this regard, Mr. Chen seems oblivious to the possibility that *he* may have been primarily responsible for the situation which resulted from his attempts to be "satirical". Accordingly, I am of the view that the union's conduct in respect of this incident discloses no violation of s. 68 [now s.69] of the Act.

24. The final circumstances put forth as constituting a breach of s. 68 [now s. 69] of the Act relates to the conduct of Mr. Smith in September, 1991. Mr. Chen had, in August, 1990, commenced work as a Materials Supply Clerk in the City's Purchasing and Supply Department. This post was pursuant to the terms of a rehabilitation policy in effect between the City and the union and Mr. Chen's posting there was to come to an end on September 30, 1991. On September 21,

1991, Mr. Chen's doctor recommended that Mr. Chen not be returned to the Public Works Department for reasons relating to his mental health. The doctor's report was made available at that time to Mr. Smith. However, previously, on August 20, 1991, Mr. Smith had written to the appropriate City official to confirm that Mr. Chen *would* be returning to Public Works. By letter dated September 18, 1991, Mr. Chen advised Mr. Smith that he did *not* want to be transferred back to Public Works. Mr. Smith very shortly thereafter rectified the situation and Mr. Chen did not return to Public Works on September 30, 1991. Mr. Chen alleges in his complaint that, in light of the medical documentation, Mr. Smith had "persisted" in his efforts to transfer Mr. Chen to Public Works. There is, quite simply, no evidence of such "persistent" efforts - in fact, the evidence suggests quite the opposite, and that, in the face of an error he made, Mr. Smith quickly attempted to (and in fact did) rectify the situation once it was brought to his attention.

25. At the hearing, Mr. Chen also complained that Mr. Smith had not "consulted" with him regarding this transfer. I do not believe that, in these circumstances, such consultation was required by Mr. Smith. Mr. Chen wrote to Mr. Smith and required of him that he rectify an error and he did not request in that letter that Mr. Smith consult with him. Mr. Chen's position was clear, and Mr. Smith acted accordingly. In my view, this alleged incident does not disclose a violation of s. 68 [now s. 69] of the Act.

26. At the close of Mr. Chen's testimony, I asked Mr. Chen if he had any further witnesses to call, explaining to him that this was the appropriate time to call any further evidence in support of his case. Mr. Chen named two individuals, neither of whom was in attendance. Mr. Chen advised that these two individuals had been in attendance at the union membership meetings and "had an impression" of what was going on at the meetings. Mr. Chen advised that he had spoken to these two individuals two months earlier, and that they were "busy" at that time and could not testify. No contact had since then been made with these individuals, and no summonses had been served on them.

27. I took Mr. Chen's indication that he wished to call these two individuals as witnesses to be a request for an adjournment and sought submissions from opposing counsel. Not surprisingly, counsel were strongly opposed to such an adjournment. After hearing Mr. Chen in response, I ruled that I would not grant an adjournment in light of all of the delays that had occurred in this matter. None of the evidence to be given by these possible witnesses was particularized in advance and I would have refused to hear the evidence of these potential witnesses on that basis in any event.

28. At the close of Mr. Chen's case, counsel for the union moved for a non-suit. Counsel asked the Board to rule that the motion for non-suit could be heard without the need for the union to be put to its election. After entertaining argument on this motion, I ruled that I would, instead, entertain Mr. Chen's argument on this matter, and that I would call on counsel for the union and the employer for argument only if necessary. Mr. Chen subsequently made his submissions and the oral ruling set out above was rendered.

29. As noted by the Board in the recent decision of *Covington Clarke* [1994] OLRB Rep. June 649, at paragraph 8:

A party must have full and fair opportunity to make its case. This includes a reasonable opportunity to outline the facts it asserts and to make submissions. But a full opportunity does not demand that a court-like hearing be held in every case. The *Statutory Powers Procedure Act*, applicable to most types of Board proceedings, does not require that every proceeding be conducted with the full formality and requirements of a typical court trial. Neither does any principle of natural justice.

30. Here, as in *Covington Clarke*, there were a number of reasons for the Board's intervention and direction that the parties proceed to submissions forthwith. Mr. Chen had completed his testimony and there were no further witnesses to be called on his behalf with relevant, admissible evidence. Written particulars preceded the applicant's evidence, which particulars set out the relevant issues of the case. The applicant's evidence, though not flagrantly inaccurate, reflected significant weaknesses in the theory of his case. Furthermore, the union indicated, through counsel, that at least one and possibly two witnesses would be called on behalf of the union, which testimony would take at least one full hearing day.

31. In light of the factors referred to above, and the fact that Mr. Chen had the onus of establishing that the union had breached the Act, it was hard to see any labour relations purpose for continuing the hearing through to completion. This proceeding was already 2 1/2 years old and the delay caused by the scheduling of new hearing dates would merely further delay the completion of the proceeding. Accordingly, the Board called on Mr. Chen to make his submissions as described above.

32. For these reasons this application was dismissed.

1151-94-R Teamsters Local Union No. 419, Applicant v. Davis Distributing Limited, Responding Party v. Chandraballi Mussai and Michelle McCready, Group of Employees, Objectors

Certification - Charges - Intimidation and Coercion - Membership Evidence - Employees alleging that they had been intimidated and coerced by union organizers into signing membership evidence - Board outlining its approach when considering charges of improper conduct in collection of membership evidence - Board finding no reason in this case to doubt validity of cards submitted on behalf of employees - Certificate issuing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *S. C. Laing* and *B. L. Armstrong*.

APPEARANCES: *Marisa Pollock* and *Jim O'Donnell* for the applicant; *Lorenzo Lisi* and *Marilyn D. Broderick* for the responding party; *Barrie W. Carlyle* for *C. Mussai* and *M. McCready*, objectors.

DECISION OF THE BOARD September 8, 1994

1. This is an application for certification. A hearing was held by the Board to inquire into allegations made by two employees that they had been intimidated and coerced by union organizers into signing membership evidence. It was submitted by these employees and by the company that the Board should give no weight to any of the membership cards submitted by the union, and dismiss this application, as a result of these allegations.

2. By decision dated August 12, 1994, the Board dismissed the allegations and issued a certificate to the union. These are the reasons for that decision.

3. The Board heard the evidence of Michelle McCready, Chandraballi Mussai, Marilyn Broderick, John Mullett, Bob Lundrigan and Jim Francoeur with respect to these allegations.

Although there was reasonable consistency between the witnesses with respect to certain events or conversations, there were also significant differences in some aspects of the evidence. In assessing the evidence and arriving at our findings of fact, we have considered all of the evidence and taken into account such factors as the demeanour of the witnesses, the clarity of their evidence, the witnesses' apparent ability to recall events and to resist the tug of self-interest in their responses to the questions, and what seems most reasonable and probable in all of the circumstances and having regard to the evidence as a whole. In arriving at our findings of fact, we have taken account of the fact that the conversations which are at issue took place from one to one and one-half months prior to the time they were directly put in issue. It was not surprising to us, in this context, that there were some inconsistencies in the evidence, some apparent contradictions, and some inability to recall details. We are satisfied that for the most part, contradictions in the evidence are due not to deliberate deception or a lack of candour, but to factors such as the passage of time and a natural tendency to shape the recall of past events in one's favour. Ultimately, we have found it unnecessary to resolve specific factual disputes as between the witnesses themselves, for we are satisfied that we can resolve this case based on the evidence of the objecting employees.

4. As general background, this application was filed on July 4, 1994. It was posted in the workplace about July 6th. The Board received a petition after the application date by employees opposed to the union, on July 11th, which was acknowledged by the Board as an untimely petition. On July 13th, the Board also received two identically worded letters from Ms. McCready and Mr. Mussai, dated July 12th, stating:

Reference DDL

File # 1151-94-R

I am writing this letter to make known that as a result of intimidating coercion, I agreed to sign a union membership card.

The individual involved in this matter coerced me into feeling like I was betraying my fellow employees and that I would not be looked upon favourably if I did not sign.

Reluctantly and very concerned about what was being stated to me, I signed this card not realizing what I was doing and not at all understanding any part of the process.

I have never been familiar with the organization of the labour unions and have no desire to be represented by one. I am able to speak for myself freely when I wish to with my employer and feel this would impair that freedom.

This organizing was not done in fairness to people such as myself who were not given information of any nature, other than what was verbally said by the organizer. I believe the organizers misrepresented the purpose.

I submit this as a formal complaint and request an investigation.

c.c. Human Resources Mgr.

5. A few days prior to the first day of hearing in this matter, counsel for the company sent a letter to the Board and to the union containing particulars of these allegations. With respect to Mr. Mussai, essentially, the allegation is that Bob Lundrigan persuaded Mr. Mussai to join the union by telling him that he was "alone in holding out". With respect to Ms. McCready it is alleged, amongst other things, that she was told that everybody else on her shift had signed, that everyone but three persons had signed, and that the union could ensure that the company did not employ people who were "outside of the union".

6. In deciding whether improper conduct by a union organizer casts doubt on the voluntariness of membership evidence, the Board is conscious of the heavy reliance that it places on membership evidence filed by a trade union in certification applications. In order to protect the integrity of a certification process which depends on such evidence, the Board takes care to ensure that where improper conduct is alleged, it is satisfied that it does not cast doubt on the reliability of that evidence: see, for example, *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444.

7. At the same time, the Board is also concerned that it not impose artificial standards of behaviour that are contrary to normal human interaction. The Board has stated that it does not act as a censor of the social pressures which are common to an organizing campaign on the part of those who either support or oppose the union. It would not be a surprise if some employees find the choice a difficult one, if some employees find it harder than others to resist peer pressure from one side or another, or if some employees make a decision which they later regret. It would not be a surprise to find that some statements made during an organizing drive turn out to be wrong, are rude or annoying, or cause distress. The Board assumes that the average employee engaged in a debate about the merits of unionization with other employees has a certain level of ability to make up his or her own mind and to act in accordance with his or her own volition.

8. In order to remain realistic about the social pressures that accompany an organizing drive, the Board has stated that it will treat as qualitatively different improper conduct on the part of union officials and improper conduct by a fellow employee. Further, the Board distinguishes between physical threats and threats to job security, and comments which do not contain those elements either directly or by implication: see *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 and *Dupont of Canada Ltd.*, [1961] OLRB Rep. Jan. 360. The Board has also distinguished between misrepresentations which are not fundamental in that they do not relate to the effect or purpose of the membership evidence, and those that do: see *Masters Construction Ltd.*, [1988] OLRB Rep. Feb. 162.

9. In this context, the Board ultimately looks to whether the conduct at issue would deter the reasonable employee, in other words, whether the reasonable employee faced with those circumstances would be able to make his or her own decision about union representation.

10. Against this background, we turn to the facts of this case. We have set out the letter which the Board received from Mr. Mussai. The particulars filed several weeks later allege that he was told by Bob Lundrigan he was “alone” in holding out his support for the union. In his evidence, Mussai maintains that he was told that there were only five people left to sign. He states that he felt pressured to sign as a result of this statement and so signed a card that same night. He also states that subsequently, he asked around and found out that there were more than five persons who had not signed with the union.

11. Mussai also testified during cross-examination that sometime prior to July 12th, he decided for his own personal financial reasons that he did not want to be involved with the union. He signed the letter of July 12th, stating that he had been coerced into signing a union card, as a means of trying to extract himself from the union. His evidence makes it abundantly clear that Mussai had essentially changed his mind about the union. He became concerned about being able to pay union dues, and decided to see if he could revoke his support for the union. The letter which was sent over his signature was not composed by him, but by Michelle McCready. When

McCready drafted the letter, she had no idea what the nature of his allegations were, only that he wanted to “get out” of the union.

12. Bob Lundrigan is an employee of the company who was instrumental in the organizing drive, responsible for collecting the majority of the membership evidence. He denies ever making such a statement to Mussai. He states that on the night of June 15th, he approached Mussai about signing a card because he had been told by another employee earlier that evening that Mussai wanted to join. They did not have much conversation, although Mussai asked Lundrigan if a certain employee had signed. Mussai acknowledged in his cross-examination that during the conversation with Lundrigan, he had told Lundrigan that this other employee would also sign for the union.

13. Even accepting for the purposes of this decision that Mussai was told that there were only five people left who had not signed with the union, this would not have led us to discount either Mussai’s membership card or to doubt the reliability of any of the other membership evidence. Without anything more, a misrepresentation or exaggeration as to the level of union support amounts to no more than salesmanship. Where a misrepresentation does not relate to the effect or purpose of the membership evidence, is about something which the reasonable employee can take steps to verify and is made in a context where there would be no reason to either believe or disbelieve the statement without further confirmation, it cannot in itself cast doubt on the voluntariness or reliability of the membership evidence. (See, for example, *Masters Construction Ltd.*, *supra*). The Board’s function is not to test the accuracy of every statement made during an organizing drive by partisans on either side. Even if a misrepresentation causes an employee to feel under pressure to sign a union card, there is a qualitative difference between social pressure and intimidation, particularly when there are likely all sorts of pressures bearing on an individual making this kind of choice, from both sides.

14. Mussai’s own actions and evidence make it apparent that it was his own change of heart about the benefits of union membership that gave rise to his allegations, rather than a belief that the statements made to him by Lundrigan intimidated him into signing the membership card.

15. Turning to the allegations made by Michelle McCready, again, we are satisfied that even on her own evidence, the conversations or interaction between her and other employees do not contain anything which would have intimidated or coerced a reasonable employee into signing a membership card. This is reinforced by McCready’s actions before and after signing the card which lend support to our conclusion that her decision to sign the card at the time it was made was her own decision. On the evidence, we find that she has simply changed her mind about her support for the union.

16. McCready states that she was told by Lundrigan on the night that she signed the membership card that “just about everybody” had signed a card. From her evidence, it does not appear that she took this statement at face value, for she questioned Lundrigan about its accuracy, and then made some of her own inquiries. She states that she was also told by Jim Francoeur that everyone but three people had signed. As with Mussai, we are satisfied that these statements do not constitute intimidation or coercion which would have deprived a reasonable employee of the ability to make their own decision with respect to union membership.

17. The most serious allegation is that McCready was told that if employees did not sign a membership card, the union could make it difficult for them to work at the company. The evidence on this allegation is less than clear and somewhat internally contradictory. We are unable to conclude from it that there was a clear and plausible threat, either direct or implied, that an employee’s job security would be in jeopardy if he or she did not join the union during the organizing drive. McCready stated in examination-in-chief that this comment was made during a conversation

with Lundrigan, in which she was asking him questions about the union, union dues, and the general workings of the union. However, later in her testimony, she was less clear about the statement that was made, stating that she “presumed” that the persons who would have difficulty working at the company if the union came in were those who had not signed a card during the organizing drive. She also stated that she understood from the statement that was made to her that it would be difficult for her to work there because she would be seen as betraying her fellow employees. In cross-examination, she stated that she might have misunderstood the statement, although she did understand that she was told that the union could make it “difficult” for people to work for the company. She also added that she was told during the same conversation that whether or not a person had signed, they were still part of the union.

18. Lundrigan also testified about his conversations with McCready. Some of the details are consistent with McCready’s evidence; others are not. He firmly denies telling McCready that just about everybody had signed a union card, or telling her that if the union came in, it could make it difficult for her to work there. Francoeur in his evidence denies having a discussion with McCready about the union’s level of support.

19. McCready also testified that she was told before she signed the card that if the union came in the employees could try and bring back a popular manager who had recently been fired, Lesalles Leonard. She also stated that in a conversation after she had signed a card, an employee told her “now we’ll try and get Leonard back”. She replied by asking why she had not been told this before. McCready testified that if she had been told this earlier, she would have signed the card a long time ago. She also states that it was the discharge of Leonard that seemed to provide the impetus for the organizing campaign. Employees vocalized their concern that if Leonard could be discharged so easily, then so could they.

20. McCready also testified that the day after she signed the card, she felt that she had signed “for all the wrong reasons”. She felt she had been lied to because after the fact she found out that many more people had not signed a card than she had been led to believe. She states that she then wrote to the Board to see if she could have her name “revoked” from the cards.

21. It is not surprising to us after the passage of time between this conversation and the time at which the allegations were particularized, and then the time of the hearing, that the evidence about some of the conversations McCready had with other employees concerning the union might be less than clear. In our assessment, this lack of clarity on some points reflects not only the passage of time, but the lack of significance of some of these exchanges to the parties at the time they were made. It is fair to say that the aspects of these conversations that made an impression on McCready were also the aspects on which her recollection was more firm. For instance, it made a strong impression on her that one issue which the union might take up was the question of Leonard’s discharge. This was apparently important to her, since she thought Leonard was a good manager. On the other hand, the details of the conversation with Lundrigan about the union’s ability to make it “difficult” for people to work at the company were less clear and were in some aspects conflicting.

22. On all of the evidence of the conversations between McCready and Lundrigan as related by McCready, and even if we were to prefer her version of the conversations over that of Lundrigan, we conclude that the statements made by Lundrigan to her did not include any direct or implied threat that if she did not sign a card during the organizing drive, she could lose her job if the union came in. Even if Lundrigan made some comment with respect to the union’s ability to make it “difficult” for persons to work at the company, we simply cannot conclude that this comment was based on a person’s lack of support for the union during the organizing drive.

23. McCready's own statements and actions after the conversation lend support to our conclusion. It is apparent that the most important factor to her in making the decision to join the union was the hope that Leonard might be reinstated by the union's efforts. McCready's own words that she felt afterwards that she had "signed for all the wrong reasons" suggest that she had a change of heart after further consideration. Finally, in the letter that McCready testified she composed on July 12th, and which was sent to the Board, no mention is made of a threat to her job security. Instead, the letter refers to McCready having been made to feel that she would be betraying her fellow employees if she did not sign, and that she would not be looked upon favourably. All of these factors lend support to our view of the conversation with Lundrigan, for if Lundrigan had made a threat that McCready would lose her job if she did not join the union, we have no doubt that this threat would have left a much stronger impression on McCready than it apparently did. We find it likely that at the time the letter was written (and having regard to the evidence that it was composed by McCready for the signature by *both* her and Mussai), the "intimidating coercion" referred to amounted to having been led to believe that most employees had already joined the union.

24. On the evidence, therefore, we do not find that there was any intimidation or coercion by Lundrigan of McCready. We also find no intimidation or coercion in the content of other conversations between McCready and other employees. Other aspects of McCready's interaction with other employees on the night that she signed her card also fall far short of constituting intimidation or coercion. The fact that she was approached by up to four employees one night, for example, does not constitute undue pressure within the context of an organizing drive.

25. Ultimately, as we have stated, we are satisfied that neither Mussai nor McCready were intimidated or coerced into signing membership cards. It is apparent that they have for their own reasons, changed their minds about their support for the union. The *Labour Relations Act* permits a change of mind to affect the membership evidence filed by a union only if it is presented before the application date. In this case, we have no timely, substantiated reason to doubt the validity of the cards submitted on behalf of Mussai or McCready or any other employee. The union filed membership evidence on behalf of over fifty-five per cent of the employees in the bargaining unit. In these circumstances, there is no reason to direct a representation vote.

26. For the reasons set out, we therefore certified the union as the bargaining agent for the unit of employees set out in our decision of August 12, 1994.

4492-93-R Ontario Nurses' Association, Applicant v. West Lincoln Memorial Hospital and West Lincoln Multilevel Health Facility Inc. operating as **Deer Park Villa**, Responding Parties v. Niagara Health Care and Service Workers Union Local 302, Christian Labour Association of Canada, Intervenor

Bargaining Rights - Related Employer - Public hospital setting up nursing home in 1984 and establishing it as separate corporate entity - ONA certified in 1987 to represent nurses employed at hospital and in 1992 to represent nurses employed at nursing home - ONA applying to have hospital and nursing home declared related employers in order to meet nursing home's "ability to pay" argument in interest arbitration - Board unable to find that nursing home acting as nurses' employer in name only or that hospital possessing real economic control over nursing home's nurses - Application dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

APPEARANCES: *Shalom Schachter*, *Carolyn Woloski*, *Helen Glintz*, and others for the applicant; *Michael J. Kennedy*, *Connie Tank*, and *Greg Huisman* for the responding parties; *Bert Wierenga* and *Isobel Farrell* for the intervenors.

DECISION OF THE BOARD: September 1, 1994

1. The names of the responding parties are amended to read: "West Lincoln Memorial Hospital and West Lincoln Multilevel Health Facility Inc. operating as Deer Park Villa". (For ease of exposition, those parties will also be referred to in this decision as the "Hospital" and "Deer Park Villa" (or the "Villa"), the applicant will be referred to as "ONA", and the intervenor will be referred to as "CLAC".)

2. This is an application under subsection 1(4) of the *Labour Relations Act*, which provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. The intervention filed by CLAC includes the following request:

The Intervenor requests that any order issued pursuant to this case be issued in respect of the service workers as well. If they constitute one employer for the requested nurses then it only makes sense that the service unit be treated similarly since we rely on an identical fact situation.

4. The hearing of this matter was substantially expedited by the parties' agreement to refrain from calling evidence and to have the application decided on the basis of the following statement of agreed facts, and the documents referred to therein:

STATEMENT OF AGREED FACTS

1. The Applicant, the Ontario Nurses Association, (hereinafter "ONA") filed a section 1(4) application with the Ontario Labour Relations Board on March 29, 1994. ONA and the Respondents, West Lincoln Memorial Hospital (hereinafter the "Hospital") and West Lincoln

Multilevel Health Facility Inc. (hereinafter "Deer Park Villa") and the Intervenor, the Christian Labour Association of Canada (hereinafter "CLAC") are in agreement regarding the facts set out in this statement. The Respondents' Book of Documents and the Supplementary Book of Documents jointly submitted by the parties also form the facts for this matter.

2. West Lincoln Memorial Hospital was incorporated on May 25, 1943 and currently operates as a Group C Hospital under the *Public Hospitals Act*. The Hospital has 78 beds distributed as follows:

Medical and Paediatrics	25 + 3
Surgical:	17
Continuing Care:	16
ICU:	4
OBS:	13
ER:	<u>0</u>
Total:	<u>78</u>

3. West Lincoln Memorial Hospital is funded, as are all other public hospitals in the province, on a global basis. The hospital is a member of the Ontario Hospital Association. As noted in paragraph 20, the Hospital participates with other hospitals in provincial bargaining with the Applicant. As a separate corporate entity, the Hospital maintains separate financial statements. A copy of the Hospital's annual report for 1992-1993 is attached including financial statements for the year ended March 31, 1993 (Exhibit 18).

4. In 1982 the Niagara District Health Council identified that there was a shortage of Nursing Home beds in Regional Niagara. As a result, 60 additional beds (Exhibit 1) were approved for the Niagara Region which were to be allocated as follows:

39 beds	-	Grimsby/West Lincoln; and
21 beds	-	Niagara Falls/Fort Erie

The News Release (Exhibit 1) points out that the Niagara District Health Council requested the provision of heavy nursing care in these beds. Subsequent to this announcement the Ministry of Health issued a call for proposals.

5. West Lincoln Memorial Hospital concluded that it would be in the best interest of the residents of its catchment area to submit a proposal to obtain the licence to operate the 39 nursing home beds. The proposal was submitted in January, 1983. In July of 1983, the Ministry announced that the Hospital had been successful in the competition for the 39 nursing home beds (Exhibit 2). The Ministry in its letter stipulated that the new facility was required to provide ongoing care for 55% of the licensed capacity requiring a minimum of 2.5 hours of care per day. i.e. Heavy care.

6. Deer Park Villa was established on February 2, 1984, pursuant to letters patent (Exhibit 3) and commenced operations in December 1986. Deer Park Villa is a 69 bed facility, 39 of which operate under the Provincial Extended Care Program. In addition, there is a 30 bed Retirement Home on the premises providing private and semi-private rooms. Exhibit 19 is a brochure describing the services provided by Deer Park both on the retirement side and the nursing home facility.

7. Deer Park Villa was created as a separate legal entity pursuant to a motion brought before the West Lincoln Memorial Hospital Governing Board on November 23, 1983 (Exhibit 31). The purpose behind the creation of Deer Park Villa as a separate corporate entity was to hopefully provide for CMHC funding and to allow the Hospital to convey some of its lands to the new institution to provide collateral for the financing of the construction of the new facility. All subsequent decisions with respect to the construction of Deer Park Villa were made by the Hospital Board until the Deer Park Villa Board took over starting in January 1987. CMHC financing for the construction of Deer Park Villa was initially pursued by the Hospital. However, ultimately financing for the construction of Deer Park Villa was provided by the institution obtaining a mortgage from the Toronto Dominion Bank.

8. The Hospital donated the land for the construction of Deer Park Villa. A land severance was carried out and the property on which Deer Park Villa is situated is now owned by it. The building of Deer Park Villa was financed in part by a mortgage held by the Toronto Dominion Bank and secured by a promissory note (Exhibit 4). Monies were also received through a fund raising campaign, a portion of which was used for the construction of Deer Park Villa. The mortgage for Deer Park Villa is secured by the institution itself consistent with the description set out in Note 3 to the 1993 Financial Statement of Deer Park Villa at Tab 24 of the Respondents' Book of Documents. The mortgage with the Toronto-Dominion Bank was arranged by Deer Park Villa. The Board of the Hospital had a role in financing start up costs, such as architect fees, for Deer Park Villa.

9. The nursing home component of Deer Park Villa is governed by the provisions of the *Nursing Home Act* and its regulations which amongst other things govern staffing. Funding is on a per diem per resident basis and the home is required to file annual Forms 7. Under long term health care reform, funding for the nursing home component of Deer Park Villa is now determined by a Case Mix Index referred to in paragraph 17. Attached as exhibits 20 to 22 are the Form 7's for the years ending 1993, 1992, and 1991 showing operating losses in each of those years.

10. The Governing Board of Deer Park Villa is comprised of the 12 elected Board members who also sit on the Hospital Board plus the representative of the Ministerial Association, who is also a member of the Hospital Board. Members to the Board of Deer Park Villa are elected at its annual meeting. Policies written following the issuance of the letters patent of the Corporation provide that the membership of the Deer Park Villa Corporation consists of the elected directors of the Hospital Board and a representative of the Ministerial Association. The Hospital's by-laws require the Ministerial Association to be represented on the Hospital Board. The monthly Deer Park Villa Governing Board meetings are arranged one week prior to those of the Hospital governing Board. The meetings of the Hospital Executive Committee are scheduled on a bi-monthly basis and are scheduled following the meetings of the Deer Park Villa Governing Board. Both sets of meetings take place in the Hospital's board room. The affairs of Deer Park Villa are not dealt with by the Governing Board of the Hospital and this is reflected in the minutes of their regular meetings. There are no committees of the Deer Park Villa Board.

11. The Officers of the Deer Park Villa Board are as follows:

Ken Southward	President
Sharon Arnold	Vice President
John Daciuk	Treasurer
Noel Ogilvie	Secretary

12. Deer Park Villa is attached to the Hospital by an enclosed walkway (Exhibit 5). A copy of the Organizational Charts for both organizations is attached (Exhibit 6). The line of responsibility relating to the Chief Executive Officer in both the Hospital and Deer Park Villa is shown, as well as the lines of communications to the Governing Board of each Facility. The Management Committee of the Hospital is a committee of Department Heads in the Hospital. Ms. Connie Tank, as Administrator of Deer Park Villa, has a standing invitation to attend these meetings and does so on occasion. The purpose of inviting Ms. Tank is to keep her abreast of happenings in the Hospital and also provide her with an opportunity of communicating events and issues that might be occurring at Deer Park Villa.

13. The West Lincoln Memorial Hospital Foundation in part, funded the financing of Deer Park Villa. A copy of the objectives of the Foundation is attached (Exhibit 7). The Foundation was established by the Hospital. The Board of the Foundation is made up of eleven members, six of whom are from the Hospital and five from the community at large. The Hospital as part of a campaign to raise funds for both it and Deer Park Villa actively solicited its employees to make contributions.

14. The financial operations of the Hospital and Deer Park Villa are not jointly operated. Separate financial planning and accounting systems are maintained for each of the Respondents. A financial statement is prepared for each respondent. Each Respondent has its own independent banking relationship, the Hospital with the Canadian Imperial Bank of Commerce and Deer Park Villa with the Toronto Dominion Bank. Deer Park Villa maintains its own accounting,

payroll and budgeting systems. Deer Park Villa receives some assistance from the Hospital in the form of entry of raw financial data into the accounting and budgeting computer systems. The data entry is completed only after Deer Park Villa staff have prepared the relevant financial material. Deer Park Villa also controls its own payables. Mr. Greg Huisman, the Director of Finance, merely processes the budgeting and accounting data provided by the staff of Deer Park Villa into the Hospital's computer system.

15. All patient treatment and diagnostic services offered by the Hospital are available to the residents of Deer Park Villa. However, no preferential entitlement is provided to these services. If an emergency occurs, a resident from Deer Park Villa is brought to the Hospital Emergency department by ambulance. Deer Park Villa residents, in addition to being transported to the Hospital by ambulance, are from time to time transported by wheel chair. Deer Park Villa residents also receive on a fee for service basis x-ray services at the Hospital. If X-ray services are required for Deer Park Villa residents, they are booked in the same fashion as anyone residing in the community would do. Deer Park Villa's laboratory services are contracted from Medical Diagnostic Services Inc. Pharmacy services are contracted for Deer Park Villa from Shoppers Drug Mart. Physiotherapy services for Deer Park Villa residents are received from the Niagara Region's Home Care Programs. The following services are purchased from the Hospital: Laundry, Dietary and Maintenance. Deer Park Villa is billed for these services by the Hospital on a monthly basis. Deer Park Villa does obtain some medical and surgical supplies from the Hospital and these are also billed on a monthly basis. The Hospital's cafeteria is open to both Hospital and Deer Park Villa staff members.

16. Deer Park Villa human resources functions are fulfilled by Connie Tank, the Administrator of Deer Park Villa. When Deer Park Villa first opened in December of 1986, the Personnel Department of the Hospital did assist with the start up. This was because of the obvious need for staff with expertise and time in this area which would of course have been lacking in the new facility. The goal in this area was to make Deer Park Villa independent and this has occurred. At present, the Director of Human Resources is available to the Administrator of Deer Park Villa as a resource. There is no structured arrangement with the Human Resources Department of the Hospital.

17. The acuity care levels of the residents at Deer Park Villa fall within the normal patient range across the Province. The 1993 resident classification category profile for Deer Park Villa provides that 43.59% of their residents were classified as F patients. The provincial average in 1993 was 32.92% (Exhibit 8). The acuity care of the residents at Deer Park Villa reflects the needs of the community. The resident mix at Deer Park Villa reflects the mandate it was required to meet to bid for the nursing home licence. The Niagara District Health Council specifically required the provision of heavy care nursing beds when it announced its approval of additional extended care beds for the Niagara Region. This community need was also reflected in the conditions set by the Ministry of Health in awarding the nursing home licence. Deer Park Villa's ability to maintain its resident mix is not based on its proximity to the Hospital.

18. Residents of the Hospital are not discharged more quickly to Deer Park Villa than similar residents of other nursing homes. This is reflected in the Hospital's Discharge Planner's reports for 1993 (Exhibit 9). In addition, it is the patient and not the Hospital that controls which nursing home a patient will be discharged to after release from the Hospital. It is a patient's personal choice which facility he or she will transfer to in order to receive long term care. This is reflected in the attached Discharge Form from the Hospital (Exhibit 10). Lastly, it is the Niagara placement co-ordination services role to co-ordinate the placement of residents in Deer Park Villa in conjunction with the needs of the broader community (Exhibits 11). Thus, patients being discharged from the Hospital do not have a unique ability to be admitted into Deer Park Villa. Residents of Deer Park Villa are admitted on a community wide needs access basis.

19. The Hospital's vacancy rate is not minimized by its proximity to Deer Park Villa for the reasons set out in paragraph 20. Moreover, the Hospital is globally funded by the Ministry of Health pursuant to the *Public Hospitals Act*. Thus, the Hospital's occupancy rate has no impact on the revenue it receives from the Ministry of Health.

20. On August 7, 1987, ONA was certified to represent certain nurses employed by the Hospital. The Hospital has traditionally participated in provincial bargaining on "central" issues with

the Applicant. The current collective agreement expired March 31, 1993, a copy of which is attached (Exhibit 12). The Hospital is again participating in provincial bargaining which is currently underway. The Hospital did not sign a local agreement with ONA incorporating the Broader Health Sector Framework Agreement and is, therefore, under Part VII of the *Social Contract Act*. ONA and the Hospital are therefore governed by the "fail safe" of Part VII of the *Social Contract Act*. The Hospital's Social Contract savings target for ONA and CLAC is \$288,100.

21. The Hospital's collective agreements with ONA and CLAC provide for a number of benefits including Hospitals of Ontario Disability Income Plan (H.O.O.D.I.P.), Hospitals of Ontario Group Life Insurance Plan (H.O.O.G.L.I.P.), Hospitals of Ontario Voluntary Life Insurance Plan (H.O.O.V.L.I.P.) and Hospitals of Ontario Pension Plan (H.O.O.P.P.). Deer Park Villa is not a member of O.H.A. and, therefore, its employees are not eligible to participate in those plans.

22. The Hospital also has a collective agreement with the Christian Labour Association of Canada covering its service employees. That agreement terminated September 30th, 1993 and a copy of the agreement is attached (Exhibit 17). The Christian Labour Association of Canada was certified to represent the service employees at the Hospital in July of 1990. The collective agreement between the Hospital and CLAC expired on September 30, 1993. Representatives of the parties met on September 30, October 29, and December 15, 1993, to negotiate the terms of the collective agreement. Agreement on a number of issues was reached by the parties. A "no board" report was issued by the Ministry of Labour on January 6, 1994 (Exhibit 42). The Intervenor requested the remaining outstanding issues be submitted to an arbitrator pursuant to the *Hospitals Labour Disputes Arbitration Act* on January 19, 1994 (Exhibit 43). The Hospital did not sign a local agreement with CLAC incorporating the Broader Health Sector Framework Agreement and is, therefore, under Part VII of the *Social Contract Act*.

23. On February 26, 1992, ONA was certified to represent certain nurses employed by Deer Park Villa by way of interim certificates on February 26, 1992 (Exhibit 13). The Board issued final certificates on December 9, 1993 (Exhibit 14). Notice to bargain was served by the Applicant on March 5, 1992. Representatives of the parties met on July 14, October 13, 26, 1992, January 14, 15, February 10, 22, April 23 and May 25, 1993, in order to effect a collective agreement. At Exhibit 15 are the terms of the collective agreement that have been agreed to by ONA and Deer Park Villa. Deer Park Villa signed a local agreement with ONA which incorporates the Broader Health Sector framework agreement under the *Social Contract Act* (Exhibit 26).

24. ONA applied for conciliation with Deer Park Villa on March 2, 1993, and met with a conciliation officer on July 6, 1993. Following receipt of a "no board" report on July 16, 1993, the Applicant served notice on July 19, 1993, of its intention to submit the outstanding items in dispute to a Board of Arbitration pursuant to the *Hospitals Labour Disputes Arbitration Act*. Nominees were appointed and an interest board established. The Chair of the Board is Arbitrator Belinda Kirkwood and a hearing date was scheduled for May 19, 1994, (Exhibit 16). The interest dispute was adjourned on that day pending the outcome of this matter (Exhibit 45). Deer Park Villa had intended to make an ability to pay argument before the interest board in response to the ONA position that they be awarded hospital parity.

25. The nursing home component of Deer Park Villa is a member of the Ontario Nursing Home Association. The nurses at Deer Park Villa are members of the Manulife Pension Plan administered by the Ontario Nursing Home Association. Separate financial statements are maintained by Deer Park Villa and the Hospital. A copy of the most recent year end financial statement dated March 31, 1993, is at Exhibit 24.

26. Deer Park Villa has a separate collective agreement with the Christian Labour Association of Canada which covers service employees both in the nursing home and retirement home facilities. A copy of that agreement which expires in 1996 is at Exhibit 23. The Christian Labour Association of Canada was certified to represent the service employees at Deer Park Villa on November 10, 1988. A first collective agreement was signed by the parties on July 19, 1989, and expired on December 31, 1990. A second collective agreement was signed by the parties on July 15, 1991, and expired on December 31, 1992. Deer Park Villa and the Christian Labour Association of Canada signed on October 21, 1993, the current three year collective agreement expir-

ing on March 31, 1996. Deer Park Villa signed a local agreement with the CLAC which incorporates the Broader Health Sector framework agreement under the *Social Contract Act* (Exhibit 44). Deer Park Villa's Social Contract savings target for both ONA and CLAC is \$4,415.80.

27. The Hospital and [Deer] Park Villa deny the allegations of ONA that its bargaining rights have been impaired by the Respondents maintaining separate financial statements. The Respondents are separate corporate entities and accordingly separate financial statements are prepared for each as dictated by the Ministry of Health, the *Nursing Homes Act* and the *Public Hospitals Act*.

28. If the Applicant is successful in obtaining a declaration of common employer and a finding that the hospital agreements with the Applicant and CLAC apply to the nurses and service employees employed by Deer Park Villa, the additional annual wage cost would be approximately \$157,556.00. As noted in paragraph 9, Deer Park Villa has shown significant operating losses in the last three years. This cost does not take into consideration additional costs in benefit improvements, assuming the nurses would be eligible for coverage of those benefits in the Hospital agreement referred to in paragraph 21. There would not be a benefit eligibility issue with respect to service employees represented by CLAC, except for the fact that those employees and the nurses at Deer Park Villa are members of the Manulife Pension Plan, as referred to in paragraph 25 and the question of eligibility for membership in H.O.O.P.P. arises.

29. Another issue would result from a successful declaration. Presumably Deer Park Villa would continue to be funded based on a Case Mix Index under long term health care reform and not on a global basis which is the case with the hospital. Finally, at least one other consequence arises from a declaration that the hospital agreements apply to service employees and nurses employed at Deer Park Villa. Under the *Social Contract Act* the employees in question would no longer remain under the Broader Health Sectoral framework agreements and would fall under Part VII of the Act (fail safe) with different reduction targets. We believe this would be contrary to the Act and specifically Section 1.1. Under section 52 of the Act, its provisions prevail over any other Act to the extent necessary to carry out the intent and purpose of the Act.

5. Although a literal reading of the statement of agreed facts would suggest that it is common ground among the parties that if the Board issued a declaration in this matter, the employees in question would no longer remain under the Broader Health Sectoral framework agreements and would fall under Part VII of the *Social Contract Act*, and that this would be contrary to that Act, counsel advised the Board at the commencement of the hearing that this was actually an issue on which there is an "agreement to disagree", and that they would each be making submissions concerning the effect of the *Social Contract Act*. As indicated by paragraph 27 of the statement of agreed facts, they also disagree about whether or not the applicant's bargaining rights have been impaired by the responding parties maintaining separate financial statements.

6. Michael J. Kennedy, who appeared as counsel for the responding parties in this matter (and who proceeded first in argument, on the agreement of the parties), submitted that the operation of the *Social Contract Act* leaves the Board without jurisdiction to deal with this application or, in the alternative, leaves the Board without jurisdiction to grant a remedy. However, he also indicated that he was content to have the Board hear the parties' submissions on that issue together with their submissions on the merits of the application. In making his submissions on the merits, Mr. Kennedy initially suggested that the Hospital and the Villa are not under common control or direction, but after candidly acknowledging that the Board might have some difficulty with that argument and after being advised that we were unanimously of the view that the Board's time would not be well spent hearing submissions on that untenable position, he did not further pursue that argument.

7. The responding parties' primary position on the merits of the application is that this is not an appropriate case for the Board to exercise its discretion under subsection 1(4) for the following five reasons: (1) the mischief subsection 1(4) is designed to remedy is simply not present in

these circumstances; (2) the application is nothing but a thinly veiled attempt by ONA to enhance rather than preserve its bargaining rights, in order to avoid having to face a significant “ability to pay” argument before the Kirkwood Board of Arbitration; (3) ONA’s “estoppel-like” conduct should be a factor in the Board declining to exercise its discretion under subsection 1(4); (4) the exercise of that discretion would have disastrous labour relations consequences, in that it would meld together several different collective agreements and groups of employees with different benefits, pension plans, and collective bargaining regimes; and (5) ONA’s lengthy delay should disentitle it to any relief under subsection 1(4) or, in the alternative, should preclude it from obtaining any retrospective relief.

8. In opposing the intervenor’s request that any order granted in this case be issued not only in respect of the nurses represented by ONA but also in respect of the service workers represented by CLAC, counsel for the responding parties submitted that the intervenor had not raised any facts or circumstances warranting any remedial relief. In this regard, it was his position that it would be possible for the Board to grant relief in respect of ONA but to decline to do so in respect of CLAC.

9. Shalom Schachter, who appeared in these proceedings as counsel for ONA, disputed the responding parties’ contention that the *Social Contract Act* leaves the Board without jurisdiction to deal with this application or without jurisdiction to grant a remedy. He argued that the Board should exercise its discretion under subsection 1(4) and grant relief to the applicant in the circumstances of this case. It was his position that the Hospital and the Villa clearly carry on associated or related activities under common control or direction, and that relief under subsection 1(4) would undoubtedly have been granted by the Board if ONA had applied for it earlier. Although he acknowledged that ONA could and possibly should have been more diligent in making an application under that provision, Mr. Schachter contended that ONA’s delay should not preclude it from now obtaining relief under subsection 1(4) because (in his view) that delay has not resulted in any prejudice to the responding parties. He also submitted that the Hospital and the Villa being separate employers for purposes of labour relations has impaired ONA’s bargaining rights by necessitating the negotiation or arbitration of two separate collective agreements, and by enabling the Villa to raise an “ability to pay” argument during that process.

10. The relief sought by the applicant is a declaration that the Hospital and the Villa constitute one employer for purposes of the *Labour Relations Act*, and that the Hospital’s collective agreement with ONA applies not only to the nurses represented by ONA who work at the Hospital, but also to the nurses represented by ONA who work at the Villa. Counsel for the applicant submitted that in addition to obviating the need for any further proceedings before the Kirkwood Board of Arbitration and precluding the Villa from pursuing its “ability to pay” argument, that relief would give ONA the “tactical advantage” of achieving for the Villa nurses a base rate significantly higher than the rate which would probably be granted to them through the arbitration process. He further submitted that the relief sought by ONA would advance long term labour relations interests by: (1) giving the nurses working at the Villa access to benefits available through the Hospital (such as H.O.O.D.I.P., H.O.O.G.L.I.P., and the other plans referred to in paragraph 21 of the agreed statement of facts), which are not available through a severable nursing home; (2) providing the nurses with greater opportunities for career advancement by giving them access to jobs posted at both the Hospital and the Villa; and (3) promoting labour relations stability by reducing fragmentation, providing fewer opportunities for leap-frogging and whipsawing, and reducing the costs of bargaining.

11. In the event that the Board concludes that the aforementioned remedy is inappropriate in the circumstances of this case, ONA seeks as an alternative remedy a declaration that the Hospi-

tal and the Villa constitute one employer for purposes of the *Labour Relations Act*, without a declaration that the Hospital collective agreement applies to the nurses working at the Villa. In describing the “tactical advantages” which ONA would derive from obtaining that alternative remedy, Mr. Schachter stated that although it would have to return to the arbitration process under the *Hospitals Labour Disputes Arbitration Act* (“HLDAA”), ONA would do so with “the corporate veil having been pierced and, therefore, in a better position to deal with the ‘ability to pay’ argument”. He also referred the Board to various entries in the financial exhibits reflecting amounts paid by the Villa to the Hospital for services such as nutrition, laundry, and maintenance, and suggested that those “intercorporate transfers are part of the financial practice that leaves the Villa with a deficit and the Hospital with a significant surplus.” Mr. Schachter further submitted that as long as the responding parties are separate employers, there is no way for ONA to control the validity of those “intercorporate transfers”, or to satisfy itself that part of the rationale for the responding parties’ decision-making process is not to manoeuvre them into a better position for purposes of collective bargaining. When asked by Board Member Ronson if ONA could not make the same submissions to the Kirkwood Board of Arbitration and request it to ignore the Villa’s “ability to pay” argument on that basis, Mr. Schachter replied that all ONA has to do before the Ontario Labour Relations Board is to establish the possibility of mischief, whereas before the Kirkwood Board of Arbitration it would have to establish actual mischief.

12. In his submissions on behalf of the intervenor, Mr. Wierenga indicated that CLAC is of the view that the Hospital and the Villa are a single employer for both ONA and CLAC, and that the Board should so declare. However, he also indicated that CLAC does not wish to have the Board declare that both of its existing bargaining units are covered by a single collective agreement, as it is of the view that the wage differences can be adequately dealt with through HLDAA.

13. In his reply submissions, Mr. Kennedy submitted that granting any of the remedies requested by the other parties would be prejudicial to the responding parties and would not be good for labour relations. In commenting on the matter of the intercorporate transactions referred to by counsel for ONA, he noted that there is nothing before the Board which supports the proposition that “the Hospital is using its economic muscle to the disadvantage of the Villa”. He also noted that it is open to ONA to question the issue of “ability to pay” before the Kirkwood Board of Arbitration. Mr. Kennedy further submitted that ONA has failed to provide any explanation for its delay in seeking relief under subsection 1(4), other than indicating “it’s now advantageous, it wasn’t before”. In disputing the validity of ONA’s alternative remedial position that the Board can declare the responding parties to be a single employer but maintain the existence of two separate ONA bargaining units, counsel for the responding parties submitted that if the Villa is part of the employer, the Hospital’s collective agreement with ONA would apply to the Villa.

14. Having duly considered the parties’ submissions (which are described above in a substantially abbreviated manner), the agreed facts, the exhibits entered on the agreement of the parties, and the numerous cases referred to during the course of argument, the Board has decided that this application should be dismissed for the following reasons.

15. It is unnecessary for the Board to comment upon the validity of the responding parties’ contention that the operation of the *Social Contract Act* leaves the Board without jurisdiction to deal with this application or to grant a remedy, because in the circumstances of this case, assuming without deciding that the *Social Contract Act* does not remove or impair the Board’s discretion to grant relief under subsection 1(4), we are not persuaded that it would be appropriate for the Board to do so. Although it is clear from the agreed statement of facts that the Hospital and the Villa carry on associated or related activities under common control or direction, the circumstances of

the instant case do not warrant the Board treating them as constituting one employer for the purposes of the *Labour Relations Act*, or granting any other relief under subsection 1(4).

16. In *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. March 308, the Board wrote, in part, as follows regarding the scope of subsection 1(4) and some of the criteria which have been used by the Board in determining whether to exercise its discretion under that provision:

15. ... The Board in *Ethyl Canada, Inc.*, [1982] OLRB Rep. July 998 described the purpose of subsection 1(4) in the following terms:

Section 1(4) of the Act deals with situations where the economic activity giving rise to the employment is or can be carried out through more than one legal entity. In such circumstances an alteration in legal form, or a transfer of work from one legal entity to another, can undermine established collective bargaining rights. Section 1(4) ensures that the institutional rights of the trade union and the contractual rights of its members, will attach to a definable commercial activity rather than the particular legal vehicle(s) through which that activity is carried on. Legal form is not permitted to obscure economic and collective bargaining realities. In this respect section 1(4) creates a regime of collective bargaining law which significantly modifies common law notions of privity of contract or the corporate veil. However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy considerations.

16. The criteria used by the Board in determining whether to exercise that discretion were set out in *John Hayman and Sons Co. Ltd.*, [1984] OLRB Rep. June 822 at 827-28:

- (1) whether the applicant is seeking to acquire bargaining rights by means of section 1(4) in order to avoid the certification procedures of the Act;
- (2) whether a declaration would disturb existing bargaining rights;
- (3) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented;
- (4) whether the application has been made within a reasonable time after the applicant became, or with reasonable diligence, should have become aware that the two or more entities were closely related; and
- (5) whether a scheme exists which would effectively defeat bargaining rights by transferring work from one related entity to another.

18. In *Donald A. Foley Ltd.*, [1980] OLRB Rep. April 436, the Board stated:

One of the significant purposes of section 1(4) is to guard against the dilution or undermining of bargaining rights already obtained such, for example, as occurs when work is diverted from a unionized employer to an associated, newly created non-union one as in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; or when there is a risk or threat that bargaining rights may be eroded, as in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879. For a more detailed review of the purpose of section 1(4), however, see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Oct. 1029 at paragraphs 9 to 13 inclusive.

17. Reference may also usefully be made to the following passage from *J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176:

21. Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See *Zaph Construction Ltd.*, [1976] OLRB Rep. Nov. 741 and *Ellwall and Sons Construction Limited* [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of *The Labour Relations Act*.

See also *E. S. Fox Limited*, [1991] OLRB Rep. July 819; *KNK Limited*, [1991] OLRB Rep. Feb. 209; *Landmark Contracting Ltd.*, [1990] June 660; *RPKC Holding Corporation*, [1986] OLRB Rep. June 828; *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945; *Dominion stores Limited*, [1979] OLRB Rep. June 506; and *Kustom Insulation Ltd.*, [1970] OLRB Rep. June 531.

18. As noted by counsel for ONA, guarding against the erosion of bargaining rights is not the only purpose of subsection 1(4). See, for example, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214, in which three of the purposes of that provision were summarized as follows:

40. Section 1(4) is designed to accomplish at least three purposes:

- (1) One objective is to prevent the erosion of bargaining rights. Take a case in which a union is certified to represent the employees of a firm; as soon as certification is granted, the proprietor redirects work to another enterprise. Treating both corporations as one employer preserves the union's bargaining rights. The large numbers of cases in this category include *Dominion Stores Ltd.*, *supra*; *Radio Shack*, *supra*, and *Great Atlantic and Pacific Company of Canada*, [1982] OLRB Rep. Mar. 386.
- (2) Section 1(4) also removes roadblocks to viable structures for collective bargaining. For example, on an application for certification, the Board may include the employees of two companies in a single unit. See *Walters Lithographing Company*, [1971] OLRB Rep. July 406 and *Diversey (Canada) Ltd.*, *supra*. For a case in which a related employer declaration was issued at the instance of management, see *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. Mar. 247.
- (3) Another function of section 1(4) is to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them rather than with someone else who is their employer in name only. See *J. H. Normick Inc.*, *supra*, and *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008.

19. In the instant case, if ONA had wished to obtain bargaining rights in respect of a single bargaining unit covering nurses working at the Hospital and the Villa, it could have filed an application under subsection 1(4) in 1987, in conjunction with the application for certification which led to its being certified on August 7 of that year to represent certain nurses employed by the Hospital. The agreed statement of facts indicates that the Villa, which is attached to the Hospital by an enclosed walkway, commenced operations in December of 1986, on land which the Hospital

donated for its construction. It may reasonably be inferred from the facts contained in that agreed statement (including the fund raising campaign which provided some of the financing for the Villa's construction, its close geographical proximity to the Hospital, and the operational links between the Villa and the Hospital) that at the time it filed that certification application ONA was aware (through the Hospital nurses whom it thereby sought to represent) that the Villa employed a number of nurses and had a sufficient nexus with the Hospital to warrant the filing of an application under subsection 1(4). However, it is evident that ONA chose at that time to seek bargaining rights only in respect of nurses working at the Hospital, and not in respect of nurses working at the Villa. It was not until approximately five years later that ONA sought to obtain bargaining rights for nurses working at the Villa, and when it did so it still did not file an application under subsection 1(4) or otherwise suggest that those nurses had an employment relationship with the Hospital. Thus, in February of 1992 ONA obtained bargaining rights for full-time and part-time bargaining units comprised of registered and graduate nurses employed by the Villa. It subsequently served the Villa with notice to bargain and met with representatives of the Villa on a total of nine days during the period from July of 1992 to May of 1993 for the purpose of negotiating a collective agreement. It also applied for conciliation and, following receipt of a "no board" report, served notice of its intention to submit the outstanding items in dispute to a Board of Arbitration pursuant to HLDAA. It was not until after the Kirkwood Board of Arbitration had been constituted and ONA had become concerned that it might have difficulty surmounting the Villa's "ability to pay" argument in that forum that the instant application was filed with the Board, with a view to eliminating that argument and, if possible, eliminating the arbitration process altogether by having the Board declare that the collective agreement between the Hospital and ONA covers not only nurses working at the Hospital but also nurses working at the Villa.

20. As indicated above, the purposes of subsection 1(4) include preventing the erosion of bargaining rights, removing roadblocks to viable structures for collective bargaining, and ensuring the union representing employees is able to deal directly with the legal entity possessing real economic control over them rather than with a legal entity which is their employer in name only. In the instant case there has been no erosion of the applicant's bargaining rights, nor does the existence of the Villa as the employer of the nurses working on its premises constitute a roadblock to a viable collective bargaining structure. Since August of 1987 when ONA was certified as bargaining agent for nurses working at the Hospital, the Hospital has participated in provincial bargaining on "central" issues with the applicant, which has succeeded (through that mechanism combined with the collective bargaining dispute resolution mechanism provided by HLDAA) in obtaining a series of collective agreements with the Hospital. It is evident that a similar combination of free collective bargaining and the dispute resolution mechanism provided by HLDAA will also result in ONA obtaining a collective agreement with the Villa.

21. There is nothing in the material before the Board in the instant case which warrants a finding that the legal entity possessing real economic control over the nurses working at the Villa is West Lincoln Memorial Hospital, and that West Lincoln Multilevel Heath Facility Inc. is their employer in name only. Whether the Villa's "ability to pay" argument has merit, or should be disregarded on the basis of the Villa's financial position being the result of artificial "intercorporate transfers" designed to leave the Villa with a deficit and the Hospital with a significant surplus (or on some other basis) is a matter which may appropriately be left for determination by the Kirkwood Board of Arbitration in the circumstances of this case. In this regard, we note that there is nothing in the material before us which provides any basis for determining whether the amounts paid by the Villa to the Hospital for services such as nutrition, laundry, and maintenance, are inflated or otherwise designed to negatively affect the Villa's financial position, as suspected by the applicant, or entirely bona fide, as contended by the responding parties, nor is there anything

before the Board which would enable us to determine whether the applicant has a reasonable basis for its suspicion in that regard.

22. In *Crown Cork and Seal Company Limited*, [1978] OLRB Rep. Sept. 809, the Board wrote, in part, as follows:

9. In August of 1977 the applicant [United Steelworkers of America] was certified to represent certain production employees of the Canadian company at Concord. These employees had previously been represented by the Crown Cork and Seal Employees' Association. In October of 1977 the applicant was certified to represent certain office and clerical employees at Concord who had previously been unorganized. Negotiations for a collective agreement for the Concord production employees commenced in October of 1977, while those for the office and clerical employees began in December of the same year. In October of 1977 negotiations for a new master agreement between the applicant and the parent firm were also held in Miami. At both the Miami and the local negotiations the applicant took the position that the employees of the Canadian company at Concord should be covered by the master agreement. Upon meeting resistance from both of the respondents to this contention, however, the applicant did not continue to press its position and a new master agreement between the applicant and the parent firm was signed sometime in October of 1977 which apparently did not make any reference to the Concord employees. The applicant and the Canadian company entered into a collective agreement with respect to the production employees at Concord during June of 1978 and into another one covering the office and clerical employees in July of 1978. It is clear from the testimony of Mr. William Mills, a representative of the applicant, that it is the desire of the applicant to have one or both of the bargaining units at Concord covered by the master agreement after the current Concord agreements expire.

10. Counsel for the applicant was somewhat vague in explaining the use the applicant would make of any Board declaration that the two respondents constitute one employer for the purposes of the Act. Counsel for the Canadian company expressed the concern that once the current Concord collective agreements expired the applicant would use any Board declaration as the basis for contending that the employees of the Canadian Company in Concord were now covered by the master agreement between the applicant and the parent firm.

11. We are of the view that it is incumbent upon an applicant seeking relief under section 1(4) of the Act to advance some valid industrial relations purpose which would be served by the board exercising its discretion and granting the relief requested. In the instant case the applicant failed to advance any such reason. If in fact the purpose behind the application is to bring the Concord employees under the collective agreement between the applicant and the parent firm, then we do not regard that as a proper basis for the Board to make the declaration requested of it.

12. The master agreement is specifically stated to be between Crown Cork and Seal Company Inc. (the parent firm) and the applicant. We were referred to nothing in the agreement which would indicate that it is meant to apply to a subsidiary of the firm which was operating outside of the United States. The applicant acquired its bargaining rights for the Canadian company's Concord employees by way of two separate certificates from this Board and those bargaining rights are currently reflected in two separate collective agreements. During the most recent negotiations both in the United States and Canada the applicant sought at the bargaining table to have the respondents voluntarily agree to alter this bargaining structure, but without success. We are of the view that section 1(4) of the Act should not be used in circumstances such as this to impose a new bargaining structure on an unwilling employer, particularly where it has not been shown that the existing bargaining structure is inappropriate or lacks viability. It should be noted further that it was not even alleged that the Canadian company was failing to fulfill its obligations under the existing bargaining structure, seeking to subvert existing bargaining rights, or somehow attempting to avoid the effects of any collective agreement which it had entered into. It is clear that the applicant is of the view that the employees of the Canadian company which it represents at Concord should be employed under the same terms and conditions as are the employees of the parent firm in the United States. Without seeking to detract from the motives which might underlie such a position, that is a matter for collective bargaining. For this Board to allow section 1(4) of the Act to be used as a means of importing the terms of U. S. negotiated collective agreements into Ontario would in effect mean that this Board would be

imposing the terms of collective agreements upon Ontario based bargaining units rather than having them negotiated through free collective bargaining. In our view this runs counter to the general intent of the Act and is not a proper use for section 1(4). Accordingly we decline to treat the two respondents as constituting one employer for the purposes of the Act or to declare them to be one employer.

23. Although not as extreme, the instant case is somewhat analogous to that case in that the applicant is seeking to bring under its collective agreement with the Hospital the nurses working at the Villa, and to thereby gain for them the superior wage levels and benefits provided by that agreement, which has evolved from a series of negotiations and arbitrations conducted in a different context, and which was never intended to apply to them. Without seeking to detract from ONA's motives in that regard, we are of the view that neither this, nor the elimination of the Villa's "ability to pay" argument which would result from the alternative remedy sought by the applicant, is a proper use of subsection 1(4), which is intended to preserve bargaining rights rather than to enhance them by providing a party with "tactical advantages" of the type sought by the applicant in the instant case.

24. Thus, although the applicant's delay in filing an application under subsection 1(4) would not by itself preclude ONA from obtaining at least prospective relief under that provision, the Board is not persuaded that in the circumstances of this case any such relief is warranted, as there are no work opportunities being shifted between bargaining units, artificial legal entities undermining bargaining rights, dysfunctional bargaining structures requiring consolidation, or other circumstances warranting relief under subsection 1(4).

25. For the foregoing reasons, this application is hereby dismissed.

2761-93-G International Union of Elevator Constructors Local 90, Applicant v. Dover Corporation (Canada) Ltd., Responding Party

Construction Industry - Construction Industry Grievance - Union alleging that lay-off violating provincial agreement and/or that employer acting in bad faith - Board finding that collective agreement requiring employee to maintain employment with one employer for one full period of six months or more before industry-wide seniority can be relied on by employee - Grievor accordingly unable to utilize his industry-wide seniority rights with the particular employer - Evidence not supporting conclusion that employer acting in bad faith - Grievance dismissed

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *S. Laing* and *H. Kobryn*.

APPEARANCES: *Stanley Simpson* and *Robert Crosby* for the applicant; *Ross Dunsmore* and *Bob Dunn* for the responding party.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER S. LAING;
September 21, 1994

I. Introduction

1. This is an application pursuant to section 126 of the *Labour Relations Act*.

2. This grievance raises two substantive issues for consideration. First, the applicant (hereinafter “the union” or “Local 90”) alleges that the layoff of Mr. Murray Cope by the responding party (hereinafter “the employer” or “Dover”) on July 5, 1993 violated Article 10 of the Ontario Provincial Agreement (hereinafter “the collective agreement”) between the National Elevator and Escalator Association (the designated Employer Bargaining Agency) and the International Union of Elevator Constructors (the designated Employee Bargaining Agency). This issue requires the Board to determine, for the first time, the proper interpretation of a somewhat unusual seniority provision which requires six months service with an employer before the employee can rely on his industry-wide seniority for purposes of layoff. Secondly, and as an alternative argument, the union alleges that the employer acted in bad faith when determining that Mr. Cope should be laid off in July, 1993. In essence, the union states that Mr. Cope was laid off so that he would not achieve six months service with Dover, which had the effect of ensuring his layoff. Both of these issues were addressed in evidence and argument.

II. The Facts

3. The grievor, Murray Cope, is a member of the union and first became employed in the elevator industry in the London, Ontario area on January 14, 1987. Mr. Cope’s work record was entered into evidence without objection. It discloses that since January, 1987, Mr. Cope has worked, on different occasions, for a number of elevator companies in the London area. For the purposes of this grievance, the most significant two separate periods of employment with Dover were July 23, 1992 to January 7, 1993, and January 15, 1993 to July 5, 1993. It is to be noted that each of these two periods of employment is approximately two weeks short of 6 months duration, a fact of great significance, as will be described in more detail below.

4. In the London area, there are four major employers in the elevator industry: Dover, Otis Canada Inc. Montgomery KONE Elevator Company Limited & Schindler Elevator Corp. Mr. Cope’s work record indicates that, with the exception of Schindler Elevator Corp., he has worked for each of these companies, but predominately (both in terms of number of times of employment and total length of employment) with Dover. The union operates a hiring hall and, in order for unionized elevator companies to obtain employees for maintenance or construction work, Local 90 must be approached for workers. There is no dispute that at all relevant times Mr. Cope’s services were obtained by Dover by way of the hiring hall.

5. As noted above, Mr. Cope was employed by Dover on July 23, 1992 (he had previously worked for Dover on 3 separate occasions dating back to March, 1987). At the time of Mr. Cope’s layoff from Dover on January 7, 1993, he was working for Dover on a modernization project at the Victoria Hospital in London, Ontario, and had been at that project for approximately 3 or 4 weeks. He was engaged on that project as a helper rather than as a mechanic. Mr. Cope testified that on January 7 he received a telephone call from Mr. Don Smith, the employer’s London Superintendent, at which time he was advised that he was to be laid off, effective that night. Mr. Cope was, at the time of his layoff, working on the “Stores” elevator, changing the door’s hardware, controllers and wiring. He testified that the construction work on the job had just started at the time of his layoff. Mr. Cope told the Board that he remarked to Mr. Smith at the time of the layoff that he had been expecting it because his 6 month probationary period was soon to be completed. According to Mr. Cope, Mr. Smith denied that the upcoming 6 month anniversary with Dover was a factor in the decision, but, according to Mr. Cope, Mr. Smith also suggested that Mr. Cope would likely be returning to work shortly.

6. Mr. Robert Crosby, Business Representative of Local 90, testified that he had had a discussion with Mr. Smith around the time that Mr. Cope was laid off in January, 1993. He, too,

suggested to Mr. Smith that Mr. Cope's layoff was due to his forthcoming 6 month anniversary with Dover. Mr. Smith assured Mr. Crosby that the layoff was due to lack of work.

7. In some respects Mr. Smith's testimony regarding the January, 1993 layoff was not particularly satisfactory. Initially, he confused the site of January, 1993 layoff with that of the July, 1993 layoff, notwithstanding his counsel's rather graceful attempts to remind Mr. Smith of the pertinent time frame. It was only after being cross-examined for some time on the event that Mr. Smith correctly recalled the place of the January layoff. Nonetheless, it was Mr. Smith's testimony that Mr. Cope's work at Victoria Hospital had been interrupted by way of layoff because the elevator he was working on was properly and necessarily turned over to an "adjuster", one Mr. Dixon. Mr. Smith acknowledged (as did Mr. Cope) that the decision to turn over the elevator to an adjuster was his to make. Adjusters are assigned to a job to "fine tune" a project, at particular points in the modernization process. Much of the work requires certain electrical skills that most mechanics do not possess. Once this work of a more sophisticated nature is completed, mechanics return to work on the elevators. Mr. Smith testified that at the time Mr. Cope was laid off in January, 1993, the Stores elevator was only 1/4 complete, but was ready for adjusting work. Mr. Cope conceded in testimony that he did not possess the technical expertise to perform all adjusting work, but disputed the need to insert an adjuster into the modernization process at that time, stating that he believed the need for an adjuster to be a "few days" away on that elevator.

8. In cross examination, Mr. Cope conceded that construction work in the elevator industry could sometimes be erratic, and that his work pattern on a day-to-day basis could be unpredictable. With respect to the Victoria Hospital project, Mr. Cope also conceded that although Dover was contracted to modernize all of the elevators at the hospital, the hospital controlled the times that particular elevators could be worked on. Mr. Smith advised the Board that Dover completed the Victoria Hospital job one elevator at a time.

9. Although Mr. Smith's testimony was, initially, somewhat confused on the issue of the place of this layoff, we are satisfied that Mr. Cope was laid off from the Victoria Hospital modernization project so that an adjuster could be assigned to perform adjusting tasks. No evidence was called to suggest that anyone other than Mr. Dixon, the adjuster, was brought in to perform work on the Stores elevator at that time. In the absence of such evidence, we are satisfied that an adjuster was brought in to perform adjusting tasks on the project. It was Mr. Smith's uncontradicted testimony that, at the time of that layoff, no other construction work was available for Mr. Cope to perform. He also stated that his service crew performed the available service work. There was no evidence before the Board to suggest that Dover had increased its work force immediately following Mr. Cope's layoff.

10. On or about January 14, 1993, Mr. Crosby received a telephone call from Mr. Smith. He was informed that Dover required a mechanic/helper for a job. Mr. Cope had not been employed elsewhere since his layoff one week earlier, and Mr. Crosby advised Mr. Smith that Mr. Cope would be returning to Dover. Mr. Crosby testified that he spoke to Mr. Smith regarding Mr. Cope's seniority, requesting of Mr. Smith that he confirm that after 16 more days with Dover Mr. Cope would be credited with his full industry seniority, having then reached 6 months total service with Dover. Mr. Smith called him back later that day and stated that Mr. Cope would not be credited with his industry-wide seniority after his first 16 days. It was Mr. Smith's recollection that it was Mr. Crosby who called him back to confirm that Mr. Cope would accept the job opening with Dover. According to Mr. Crosby, Mr. Smith told him that it was "almost guaranteed" that Mr. Cope would be employed for 6 months from that date (which would permit Mr. Cope to establish his industry-wide seniority). Mr. Smith could not recall these conversations. However, we are of

the view, on the basis of Mr. Crosby's testimony, that these discussions took place as described by Mr. Crosby.

11. Mr. Cope returned to employment with Dover effective January 15, 1993. He was assigned to an Ontario Hydro project, at the Lambton Generating Plant in Compton, Ontario. Mr. Cope worked at this project as a mechanic. A helper was also assigned to this job, which Mr. Cope described as new construction of geared elevators. It was Mr. Cope's recollection that the actual construction of the elevators had not yet started when he attended at the site. In fact, there was no evidence that anyone had commenced work on the elevators at the Lambton Generating Plant prior to Mr. Cope's attendance at the site. Mr. Cope testified that, months earlier, he had attended at the site to help unload the materials necessary to construct the elevators. He could not recall seeing any other materials on the site upon his arrival on January 15, 1993. The first task performed by Mr. Cope was to clean the rails, which took a few days to complete. A shack was constructed by Mr. Cope and the helper. A few weeks after commencing work at the site further materials arrived. Within a month two other mechanics were working on this project, at different buildings on the site.

12. There was a great deal of testimony regarding whether this Ontario Hydro project was up and ready to proceed on January 15, 1993. It was Mr. Cope's testimony that Dover regularly commenced construction projects without the full power necessary to operate the elevator. Mr. Cope stated that most construction jobs that he had worked for Dover did not have "permanent" power at the outset. In this case, Mr. Cope said that when he started work there was some power available but not enough to run the elevator. He stated he did not need full power for more than two weeks, but when he ultimately needed to operate the elevator there was sufficient power to do so. Mr. Smith, on the other hand, stated that it is Dover's policy to not start a job without full power. Mr. Smith stated that contractors often try to get Dover's crew on site by promising power by a certain date, and that Dover has, in the past, found that crews at the site were unable to work because power was not available notwithstanding what Dover had been promised. Accordingly, to protect itself, its policy for the past few years has been to send crews to the site only when power is established. On this particular project, Mr. Smith insisted that power was available upon Mr. Cope's commencement at the project, and stated that he personally observed Mr. Cope utilizing the power during the first two weeks after Mr. Cope was assigned to the project. In cross-examination, Mr. Smith insisted that he was first aware that the Ontario Hydro project would be up and running, with power, on the day before Mr. Cope started at the project. In our view, having heard all of the evidence, it would appear to us that there was at least temporary power at the time Mr. Cope attended at the site, sufficient to perform the preliminary work required before operating the elevator. It would also appear to us that the power to operate the elevator, if not there initially, was supplied to the site relatively soon thereafter. Most importantly, there was no evidence before us that there was even temporary power at the site *prior* to January 15, 1993.

13. Approximately two months after arriving at the Ontario Hydro project, Mr. Cope went back to the Victoria Hospital project in London, Ontario, to start the modernization of another elevator at the hospital. This time he was employed as a mechanic. Once his work on this elevator was completed, Mr. Cope returned to the Ontario Hydro project at Lambton. At Lambton, he continued to perform construction work on the elevators.

14. On July 2, 1993, Mr. Cope received a telephone message from Mr. Smith, advising him to attend at Dover's offices on Monday, July 5. By July 2, 1993, Mr. Cope was assisting the drywallers of the hoistways at the Ontario Hydro site. Mr. Cope was operating the elevator in support of the drywallers. He was, by that time, the only Dover employee working at the site. Mr. Cope testi-

fied that there was one entire hoistway yet to be drywalled plus completion of the one that he was then working on.

15. The work being performed by Mr. Cope shortly before his departure from the Ontario Hydro site was on behalf of the contractor on the site, "Joy M.K.", which was paying Dover for his services. Mr. Cope acknowledged that should this contractor no longer require his services, this assignment would end. According to Mr. Smith, Mr. Cope was removed from the Ontario Hydro site because Joy M.K. called on July 1, 1993 or July 2, 1993 and advised that it no longer needed an elevator operator's services at that time. Mr. Smith conceded that he knew that Joy M.K. would eventually need the services of an elevator operator to finish the drywalling work, but stated that he did not know when those services would be needed. Mr. Smith stated that Dover had no other work for Mr. Cope to do on that site at that particular time. No evidence was called to establish otherwise.

16. On July 5, 1993, after attending at Dover's offices in London, Mr. Cope was asked by Mr. Smith to accompany an adjuster, Mr. Dixon, to Victoria Hospital. Mr. Cope assisted Mr. Dixon at the hospital during a government inspection of one of the modernized elevators that was performed on that day. The evidence established that this inspection was a one day task. At the end of that day, Mr. Cope was laid off by Mr. Smith. Once again, Mr. Cope made reference to the upcoming satisfaction of his 6 month period, and once again Mr. Smith replied that the 6 month period had nothing to do with the decision to lay him off. Mr. Smith maintained that there was a lack of work at that time, and that Mr. Cope had the least seniority. Accordingly, Mr. Cope was laid off. The situation did not change until August, 1993, at which time hirings were effected by Dover.

17. According to Mr. Smith, on July 7, 1993, JoyjH jMM.K. contacted him and advised that an elevator operator was once again needed at Lambton because it was ready to drywall the second elevator hoistway. Mr. Smith assigned, effective July 8, 1993, one Mr. Roy McRoberts, who had previously worked at Lambton as a helper, to run the elevator. This task took five days for Mr. McRoberts to complete.

18. The union, by way of letter dated July 12, 1993, grieved Mr. Cope's layoff. There is no dispute that, had Mr. Cope achieved his industry-wide seniority as at July 5, 1993, he would have had greater seniority than at least 8 other Dover employees, and that Mr. Cope was, in those circumstances, laid off improperly. Mr. Smith conceded in testimony that he was aware of Mr. Cope's seniority (both with Dover and within the industry) as at the time of the July 5, 1993 layoff.

III. The Collective Agreement

19. The relevant provisions of the collective agreement are the following:

2.03 Without limiting the generality of the foregoing, and subject to the other provisions of the Agreement, the Employers shall have the right to:

- (a) Select personnel, hire, assign work or duties, transfer, layoff and recall employees;
- (b) discipline or discharge for just cause;
- (c) establish and enforce reasonable rules of conduct to be observed by employees.

...

10.14.01 Seniority of an Employee is his total length of service in the industry in Ontario.

10.14.02 Seniority shall not be broken, but shall not accumulate while an Employee is on lay-off, or is on an official leave of absence, or if he is promoted to a Supervisory position (Supervising Bargaining Unit Employees), or a member working with other than the same Employer outside the Province of Ontario.

• • •

10.15 In the event that lack of work requires a reduction in the number of employees in the employ of an employer, employees shall be laid-off in the following order:-

(0a) Probationary Helpers I, without regard to seniority. (First block to be laid off.)

(b) Probationary Helpers II, without regard to seniority. (Second block to be laid off.)

(c) Helper I, without regard to seniority. (Third block to be laid off.)

(d) Helper II, without regard to seniority. (Fourth block to be laid off.)

(e) Improver Helpers without regard to seniority. (Fifth block to be laid off.)

(f) Mechanics in seniority, provided the Employers remaining Mechanics have the necessary skill and ability to do the work that remains.

Any Mechanic in the Employer's workforce, affected by a lack of work, may accept assignment to Improver Helper, or take a lay-off.

Assignments of this nature shall not be used as a disciplinary measure and will only be made as a result of a reduction in the Employer's workforce.

Such assignments shall not be prejudicial to the Mechanic and will not affect his classification of Mechanic for lay-off purposes.

There shall be no industry-wide bumping except that Mechanics may bump Temporary Mechanics and Probationary Helpers on an industry-wide basis. Helpers may bump Probationary Helpers on an industry-wide basis.

Notwithstanding the foregoing provisions of 10.15 an employee has no seniority rights with an Employer for a period of six (6) months after commencing work with that Employer. After the six (6) month period, full seniority rights will be credited with the new Employer. In the event of a reduction in the workforce with that Employer during the six (6) month period this employee will be the first to be laid-off with the exception of Probationary Helpers.

Numerous other provisions of the collective agreement were referred to during the course of argument. We will make reference to some of those provisions below.

IV. Decision

(a) Interpretation of Article 10 of the Collective Agreement

20. At the heart of the dispute between the parties is the interpretation of section 10 of the collective agreement. It is the position of Local 90 that, when interpreted properly, Article 10 of the collective agreement permits an employee to exercise his industry-wide seniority once he has accumulated six months service with that employer - be it one period of employment of 6 months duration or more, or a number of different periods of employment which, when totalled, accumulate service equal to or exceeding the 6 month benchmark contained in the Article. Dover, on the other hand, asserts that the collective agreement clearly requires an employee to maintain employment with one employer, such as it, for *one full* period of six months or more before industry-wide

seniority can be relied upon by the employee. On the facts of this case, of course, the grievance would clearly be successful if the interpretation of the provision were as is posited by Local 90.

21. Having regard to the evidence and argument of counsel, we are of the view that the position of Local 90 does not withstand close scrutiny. Counsel for Local 90, in a brave attempt to bolster the position taken by the union, focused much of his argument on the final paragraph of Article 10.15. He noted that the language contained therein referred only to "a period of 6 months", and not to six "consecutive", "continuous" or "uninterrupted" months. Counsel questioned whether it was reasonable for the parties to have negotiated a clause which would permit for the loss of an employee's accumulated seniority because of one mere day's layoff. Counsel also relied upon the terms of Articles 10.14.01 and 10.14.02 of the collective agreement, and emphasized the proposition contained at paragraph 6:0000 of *Canadian Labour Arbitration* (3rd ed, Canada Law Book), by authors Brown and Beatty, in which the following is stated:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

Counsel submitted that our interpretation of Article 10.15 should be made in light of the above excerpt of Brown & Beatty. Counsel also turned the Board's attention to the following cases and authorities, which were, admittedly, not on point given the somewhat unique nature of this case: *Re Canadian Broadcasting Corporation* (1985), 21 L.A.C. (3d) 389 (M. Picher); *Re Navistar International Corporation Canada* (1990), 14 L.A.C. (4th) 285 (Palmer); Palmer et al; *Collective Agreement Arbitration in Canada* (2d ed, Butterworths), at p.394; and Brown & Beatty, *supra*, at para 7:5010, notes 11 and 12.

22. The difficulty with Local 90's position was brought out nicely in argument by counsel for Dover. A careful review of other provisions of the collective agreement indicates clearly that during negotiations the parties had on numerous occasions, and in numerous contexts, turned their attention to the appropriateness of aggregating several distinct periods of time. When such a right was considered appropriate in the circumstances, language clearly effecting such a right was inserted into the collective agreement. In light of that specific language, it was argued, it is difficult, if not impossible, to conclude that aggregating several periods of time could have been intended for the purposes of Article 10.15.

23. Our analysis starts with Article 10.15 of the collective agreement. The language under consideration provides that, notwithstanding anything contained in Article 10.15, an employee has no seniority rights with an employer for "a period of 6 months" after commencing work with that employer. Once "*the 6 month period*" is worked by the employee, full seniority rights are credited with the employer. In the event of layoffs "*during the six month period*", this employee is the first to be laid off with the exception of Probationary Helpers. A plain reading of the provision (insofar as it makes reference to "*the ... period*") suggests quite strongly that *one* period of work for a full 6 months in duration was intended by the parties.

24. That this is, in fact, what was intended by the parties is highlighted by the provisions of Article 10.03.01 of the collective agreement (regarding Probationary Helpers I) which reads as follows:

"A newly hired employee without elevator experience shall be classified as a probationary employee in the status of Probationary Helper I for a period or periods totalling six (6) months within the aggregate period of not more than nine (9) months".

(emphasis added)

Clearly, when the parties agreed to permit the accumulation or aggregation of separate periods of work for certain purposes, they were capable of drafting language to effect such an intention. The absence of similar language in Article 10.15 confirms that the accumulation or aggregation of separate periods of employment was never intended by the parties to apply to the reduction of employees due to lack of work pursuant to Article 10.15.

25. Counsel for Dover made numerous other references during argument to provisions in the collective agreement where the parties have, through the language utilized, evidenced a similar intention to allow for the aggregation of more than one period of time. In our view, it is unnecessary to set out all of those examples. It is, in our view, manifest from the provisions of the agreement, in particular those set out above, that the parties have intended that an employee work *one* period of at least six months duration in order to take advantage of his full industry-wide seniority for the purpose of protection from layoff due to lack of work.

26. We point out that, in our view, there is nothing inherently unreasonable or unfair with this result. Counsel for Local 90 submitted in argument that there was a degree of unreasonableness inherent in this conclusion. We disagree. The parties to this agreement have determined that an employee without seniority with a particular employer cannot utilize his industry-wide seniority to protect himself from layoff until he serves one 6 month period with that particular employer. Presumably, this provides the employer with an opportunity to assess the employee's ability over a prolonged period of time rather than by reference to a larger number of discrete time periods. Although the clause is unique it does not appear to us to be inherently unreasonable or unfair. The parties, during negotiations, "drew the line" at six months and it is not the function of this Board to draw the line somewhere else or to eliminate the line because one of the parties believes it to be unfair when applied to situations on the margin. No matter where the line is drawn, there will always be marginal cases.

27. As to the other submissions made by counsel for Local 90, we can only note in passing that the excerpt from Brown & Beatty, *Canadian Labour Arbitration*, para 6:0000 makes reference to situations where seniority has already been *achieved* by an employee; it is in those circumstances that "utmost strictness" should be taken by a board of arbitration to protect that worker's seniority. We do not disagree with that proposition. Here, of course, Mr. Cope has not achieved his seniority *with Dover*, whereas *other* employees of Dover have. From the perspective of those employees of Dover who have achieved seniority, it is critical that a careful reading of Article 10.15 be made by the Board, for, if Mr. Cope were to be successful in this grievance, someone *else's* seniority would likely be insufficient to protect *that person's* position with Dover.

28. With regard to the union's argument respecting Articles 10.14.01 and 10.14.02, in our view neither of these clauses supports the proposition urged by Local 90. It is clear that both of these provisions make reference to industry-wide seniority and its accumulation or maintenance during layoffs or during other particular circumstances. Article 10.15, on the other hand, speaks to the crediting of that industry-wide seniority with a particular industry employer, which is at the heart of the dispute between the parties before us.

29. In our view, therefore, this grievance is dismissed insofar as it depends on the interpretation of Article 10 of the collective agreement. We turn below to the allegations of bad faith made against the employer.

(b) Allegations of Bad Faith

30. Article 2.03 of the collective agreement, the management's rights clause, specifically reserves the employer's authority to lay-off employees, subject to other provisions of the collective agreement. Counsel for the union asserted that the collective agreement implicitly requires that the employer not act in bad faith when determining whether an employee, such as Mr. Cope, is to be laid off. In support of that proposition, counsel relied upon the decision of this Board in *Westinghouse Canada Limited* (Board file 2191-82-M, July 13, 1983, unreported), a grievance arbitration award involving the current applicant. It was the position of employer's counsel that there is nothing in the collective agreement mandating good faith on the part of the employer, and that the only authority for such an obligation is the decision of *Westinghouse Canada Limited*, a decision which is factually distinguishable from the facts of this case.

31. It is true that there is no provision in the collective agreement which explicitly mandates good faith conduct on the part of Dover when it determines to lay off an employee. The arbitral jurisprudence to date is contradictory, and it is currently unsettled whether an obligation to act fairly, reasonably, and in good faith is required of an employer in the exercise of its management's rights contained in the collective agreement. (Contrast, for example, *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al* (1981), 124 D.L.R. (3d) 684 with *Re Council of Printing Industries of Canada and Toronto Printing, Pressmen & Assistants' Union No.10 et al* (1983), 149 D.L.R. (3d) 53, both decisions of the Ontario Court of Appeal.) In our view, such an obligation is relevant to in the collective agreement before us. The Board in *Westinghouse Canada Limited* found such an obligation after reviewing identical language in a predecessor agreement to the one before us, and we agree with that conclusion. As was noted by the Board in that case, to adopt a meaning of Article 2.03 in accordance with that urged by the employer would, in effect, render the final clause of Article 10.15 meaningless.

32. There can be no doubt that in a case such as that before us the ultimate onus of proof is on the applicant to establish the responding party's bad faith, on the balance of probabilities. Evidence in such cases, as in the instant case, is often circumstantial in nature, as the union will in most cases not have an admission from the employer that it has acted in an attempt to avoid its obligations under the collective agreement (see, however, *Westinghouse Canada Limited*, *supra*, for a case in which such an admission was made).

33. Counsel for Local 90 outlined the evidence that the applicant relied upon in the instant case. Counsel focused on the evidence of Mr. Smith, who ultimately made the decision to lay-off Mr. Cope, submitting that the quality of his testimony could only lead the Board to conclude that his recollection was more than just deficient, but that it was "convenient". Counsel noted that both the January, 1993 and the July, 1993 layoffs occurred just before Mr. Cope had reached 6 months of consecutive employment with Dover, and he questioned the "coincidental" nature of this development, especially in light of Mr. Smith's acknowledgment in evidence that he was aware of Mr. Cope's seniority at Dover.

34. Counsel noted the disparity in testimony between Mr. Cope and Mr. Smith regarding the state of both the Victoria Hospital and the Ontario Hydro projects at various points in time. With respect to the Victoria Hospital Stores elevator work, counsel noted Mr. Cope's view that his work had not reached a point where an adjuster was necessary, which contradicted Mr. Smith's view that adjusting needed to be performed. Counsel highlighted Mr. Smith's confusion as to what work was being performed by Mr. Cope in January, 1993, and emphasized as well certain discrepancies in his testimony when compared to that of other witnesses. (Such as whether Mr. Cope was laid off in January, 1993 by phone or in person; whether he worked at the Victoria Hospital project

in the role of mechanic or helper; and whether Mr. Smith did or did not tell Mr. Crosby that the grievor would likely be employed soon for 6 full months after the initial layoff in January, 1993.)

35. With respect to the Ontario Hydro project, counsel focused on the differences between Mr. Cope's testimony and Mr. Smith's testimony regarding the commencement of Dover's work at the site. Counsel wondered why Mr. Cope, instead of being laid off from the Victoria Hospital project in January, 1993, was not sent directly to the Lambton Generating Station. On July 5, 1993, Mr. Cope was laid off, notwithstanding his observation that the contractor had not completed drywalling the elevator hoistway. Counsel notes that, effective July 8, 1993, Mr. Smith assigned the same work to Mr. McRoberts, purportedly at the request of the contractor, Joy M.K. Counsel disputed Mr. Smith's assertion that no work for Mr. Cope existed as at July 5, 1993, submitting that Mr. Cope was never considered for service work which was available at the time. He submitted that it was "strange" that work could not be found for Mr. Cope for July 6 and 7, 1993. In all of the circumstances, counsel asked the Board to conclude that Mr. Smith had "engineered" Mr. Cope's layoff so that his seniority in the industry would not be imposed on Dover.

36. Having considered all of the evidence and the submissions of the parties, particularly those of counsel for Local 90, we are of the view that the union has not established, on the balance of probabilities, that Dover, through Mr. Smith, acted in bad faith when laying off Mr. Cope in July, 1993. We set out our reasons for reaching this conclusion directly below.

37. We start our analysis with the observation that "bad faith" is usually a particularly difficult state of mind to establish. There is, before us, objective circumstances which could easily lead one to question the motivation of the employer in laying off Mr. Cope. It seems curious that he would be laid off twice by Dover, in the space of just over 6 months, both times having worked just slightly less than the 6 months required to establish his industry-wide seniority with Dover. From the perspective of Local 90 and Mr. Cope, who personally questioned the reasons put forward by Mr. Smith for both the January, 1993 and July, 1993 layoffs, the situation was (and is) highly suspicious. It called out for an explanation and, accordingly, a grievance was launched and proceeded to arbitration before the Board.

38. The circumstances outlined directly above were testified to by Mr. Cope and Mr. Crosby. On their own testimony, and in the absence of any explanation by Dover, the Board may well have concluded that the union had established, on balance, the proposition that Mr. Smith, on behalf of Dover, had acted in bad faith when laying off Mr. Cope. However, Mr. Smith testified to the reasons for the layoffs and, in our view, established a credible explanation for the layoffs. In the absence of further evidence from the union, we were not persuaded, on balance, that there was sufficient evidence to lead us to conclude that Mr. Smith and Dover had acted in bad faith.

39. Considering first the January, 1993 layoff from Victoria Hospital, it was Mr. Smith's testimony that Mr. Cope was laid off in order to permit necessary adjusting work to be performed on the Stores elevator. There is no evidence contradicting Mr. Smith's testimony that adjusting was necessary at that time except that of Mr. Cope, who could only opine that, in his view, adjusting was "a few days" away. Mr. Smith testified that he had previously, during his 30 years in the elevator industry, performed adjusting work. Mr. Cope acknowledged he could not perform all adjusting work, and, therefore, if adjusting was required at the time Mr. Cope was not the right person for the job. Mr. Smith was not cross-examined on the reasons why he felt the Stores elevator required adjusting at the particular time it was adjusted, and, accordingly, we cannot assess the legitimacy of the reasons for this decision in light of the entire circumstances. Just as importantly, it was open for Local 90 to have called as a witness Mr. Dixon, the adjuster, to outline his view of the state of the elevator as at January, 1993. Mr. Dixon was not called to testify by the union, and,

accordingly, we are only left with Mr. Smith's explanation contrasted with that of Mr. Cope. There was no evidence to suggest that Dover had any other work available at this time for Mr. Cope to perform. On balance, on the evidence before us and in the absence of other evidence to the contrary, we are not persuaded that Mr. Smith laid off Mr. Cope in January, 1993 for purpose of avoiding his six month's service with Dover.

40. With respect to the assignment of Mr. Cope to the Lambton Generating Plant, once again the Board was left only with the divergent opinions of Mr. Cope and Mr. Smith. As noted above, it appears evident that the site, upon Mr. Cope's attendance, had at the very least "temporary" power for preliminary work. By the time Mr. Cope was required to operate the elevator, permanent power was in place. This is consistent with Mr. Cope's testimony that no permanent power is required to start work, and Mr. Smith's position that Dover will not send a crew to a site unless power has been established. What is in dispute between the parties is whether this site was one to which Mr. Cope could have been assigned on January 7, 1993, rather than being laid off. However, the *only* evidence before the Board on this issue is that of Mr. Smith, who testified that he was first told that power was on at the site on January 14, 1993. The union called no witness to challenge Mr. Smith's assertion. Accordingly, in the absence of any evidence to the contrary, the only conclusion that can be reached is that it was not possible to assign Mr. Cope to the Lambton Generating Plant on January 7, 1993 or before January 15, 1993.

41. A similar conclusion applies to the evidence relating to Mr. Cope's layoff on July 5, 1993. Mr. Cope testified that the drywalling work had not been completed by that date, thus raising the question of whether the decision to remove him from the site was motivated by other concerns. Mr. Smith stated that the contractor, Joy M.K., called just prior to the layoff and advised him that it no longer required the services of an elevator operator. There was no testimony called by the union to show that Mr. Smith was not being frank with the Board; no employee or official from Joy M.K. was summoned to testify as to its decision to cancel Mr. Cope's services, why the decision was made, when it was made, or when it was communicated to Mr. Smith. There was no evidence adduced to the effect that Mr. Smith was aware, at the time Joy M.K. called to communicate that it no longer needed an elevator operator, that Joy M.K. would need another operator shortly thereafter (even assuming, for the purposes of argument, that such a future need could have had an effect on Dover's obligations towards Mr. Cope relating to layoff). Notwithstanding counsel's suggestion that Dover did not offer 'service' work to Mr. Cope at this time, there is no evidence to suggest that Dover had any other work for Mr. Cope to do at the time of the July lay-off. Mr. Smith's testimony was uncontradicted in that respect. In summary, there is just no evidence before us to suggest that Mr. Smith's testimony was inaccurate.

42. This leads us to our final observation regarding the testimony of Mr. Smith. Much of Local 90's position was premised on the assumption that Mr. Smith was being less than frank in his testimony. There is, in our view, no evidence before us to suggest that Mr. Smith did not make his best effort to recall the events in question when testifying. As was noted earlier, Mr. Smith clearly had difficulty placing the events in proper chronological perspective, until it was clarified for him in cross-examination. However, his recollection of the substantive events (i.e. the state of the Victoria Hospital project and the Ontario Hydro project at the appropriate times) seemed to us to be solid. Counsel for Local 90 focused in argument on a number of minor discrepancies in Mr. Smith's recollection as compared to Mr. Cope and Mr. Crosby. Whether or not Mr. Cope was working at the Victoria Hospital project in the role of a helper or that of a mechanic is something which is hardly indicative of a lack of credibility if answered in error (especially when testimony is given 15 months after the event). These types of discrepancies are hardly the stuff that "bad faith" allegations are made of. Furthermore, we are unwilling to reach the conclusion that Mr. Smith acted in bad faith for the reason that he was aware of Mr. Cope's seniority with Dover, and his industry-

wide seniority, when determining Mr. Cope's layoff. It should hardly come as a surprise to Local 90 that Mr. Smith laid off the person with least seniority with Dover, and, in order to effect this, Mr. Smith would by definition have to know of Mr. Cope's last date of hire with Dover and the seniority of all other Dover workers. In our view, Mr. Smith's knowledge of Mr. Cope's seniority is not helpful to the determination of this grievance.

43. In the result, this grievance is dismissed.

DECISION OF BOARD MEMBER H. KOBRYN; September 21, 1994

1. First and foremost I am in full agreement with the majority's interpretation of Article 10.15 dealing with industry-wide seniority and when an employee attains this seniority which is after a six month work period with the new employer, and also deals with layoffs when there is a reduction in the workforce and in which order these employees will be laid off.

2. One thing is clear, Article 10.15 does not give the employer carte blanche rights to prevent a new employee from attaining this six month work period to get his full seniority rights with this new employer.

3. My dissent is based on what is not mentioned in the majority decision about the allegations of bad faith. For example, the statement by the employer's counsel about the need for the protection of the employer's present employees' employment rights supposedly from a person who has spent most of his employment time in the industry working for other employers, then only work for a six month period for his new employer and attain seniority rights and employment opportunities as in this case over eight or nine of the employer's present employees.

4. This statement of the employer's counsel to this tribunal speaks volumes about the attitude of this employer and the elevator industry towards a mechanic with no seniority with his new employer. Generally speaking, this attitude is endorsed by that majority of the union membership who have attained their full seniority with their present employer. Persons in this category are known throughout the construction industry as "steady eddies" providing of course, that their present employer has sufficient work to keep them employed.

5. What is not mentioned in the majority decision is that this attitude toward the new employer cannot be applied to this grievor because of his work history as put in evidence before this panel and as I will list below:

Mr. Cope's work history in the industry begins on January 14, 1987 to the date of his last layoff on July 5, 1993.

Armour-Went	start Jan. 14/87 — laid off Feb. 6/87 — 4 weeks
Dover	start Mar. 2/87 — laid off Dec. 11/87 — 9 months
Dover	start Jan. 4/88 — laid off Apr. 22/88 — 4½ months
Otis	start May 16/88 — laid off Dec. 23/88 — 7 months
Dover	start Jan. 3/89 — laid off May 8/92 — 41 months
Montgomery	start May 20/92 — laid off May 20/92 — 1 day
Otis	start May 26/92 — laid off June 18/92 — 4 weeks
Dover	start July 23/92 — laid off Jan. 7/93 — 24 weeks
Dover	start Jan. 15/93 — laid off July 5/93 — 24 weeks

By the uncontradicted evidence above, Mr. Cope has worked for Dover 66 months while he only worked 9 months for all the other employers in the industry. Also not mentioned was the grievor recall rights and seniority from Dover so we have to look at Article 10.16 which states as follows:

The recall rights of employees laid off by an employer (for mechanic assigned to the improver helper rate) shall be in the reverse order of the layoffs made in accordance with this article. The employer shall be obligated to recall laid off employees and the *recall rights shall be limited to a period of six (6) months*. An employee shall at his option accept or reject a recall to his former employer. A rejection of recall terminates an employee's recall rights.

6. The grievor had recall rights from Dover as per Article 10.16 for six months from the time of his layoff on May 8, 1992. While on layoff, Mr. Cope was sent by his union to Montgomery for a one day job on May 20, 1992. He then was sent by the union to Otis on May 26, 1992 where he worked until June 18, 1992. During this period of employment with Otis, Dover called the union hiring hall for a mechanic for a two day job. This was offered to Cope by the union, but he rejected this two day job in favour of his present employer Otis. This rejection cost him his recall rights and his seniority with Dover.

7. Cope was rehired by Dover on July 23, 1992 well within the six month recall period which was not until November 8, 1992, when his recall rights and industry seniority would have still have been intact with Dover but for the grievor's one sin, which was rejecting a two day job offer by Dover. That gave rise to the employer insisting that the collective agreement be enforced to the full extent of the law.

8. I do not think that this result was the intent of this Article, because this result has a counter-productive effect on the union's hiring hall and on all the other employers in the industry who require additional skilled mechanics for short periods of time. Employers in this industry have stated to tribunals in other cases that they have to train new mechanics in their ways of operating before the new mechanic becomes a productive member of the employer team. Also in situations where the new employer sends the mechanics to jobs away from base and has to pay them transportation costs and then have these same mechanics forced to quit their new employer in order to protect their recall rights and seniority with their former employer. This is where this Article as written is counter-productive to both sides but especially to the skilled mechanic whose only desire is to keep himself employed in the industry when there is a reduction of the workforce with his former employer where he has attained industry-wide seniority.

9. I agree with the majority decision wherein they state that there was confusion on the part of Mr. Smith as to where Mr. Cope was working both times that he was laid off, and it was only clarified in cross-examination. The one thing that Mr. Smith was absolutely clear about was seniority of the employees. When asked about this, his reply was:

"I know the seniority of all our employees with less than six months".

Mr. Smith knew exactly when the time had come for the layoff of Mr. Cope so that he would not complete his six month period.

10. I feel that the employer did not make any real effort to keep Mr. Cope employed after he reached 24 weeks of employment in the last two periods of employment with Dover which were July 23, 1992 to January 8, 1993 and January 15, 1993 to July 5, 1993.

11. At the time of the January 7, 1993 layoff under cross-examination, Mr. Smith testified that the grievor's work at Victoria Hospital had been interrupted by way of a layoff because the elevator he was working (in which he was on less than two weeks) was properly and necessarily turned over to an "adjuster", a Mr. Dixon. Yet at the time of his 2nd layoff on July 5, 1993, he was recalled from his job at the Lambton Generating site at Courtwright on Friday and on Monday July 5, 1993, he was sent by Mr. Smith to accompany Mr. Dixon "the adjuster" to Victoria Hospital to assist Mr. Dixon during a government inspection of one of the elevator's where moderniza-

tion work was done by Dover. If he could work and assist Mr. Dixon on July 5, 1993, why not on January 7, 1993 if Mr. Smith wanted to keep Mr. Cope employed.

12. Mr. Smith seemingly also had a good excuse as to why Mr. Cope could not have been sent to the Lambton Generating Plant job at Courtwright just outside of Sarnia, because the company has a policy to send crews to a site only when permanent power is established. This policy did not prevent the company two months earlier from sending Mr. Cope to the Lambton Plant to unload the materials necessary to construct the three new elevators, and to build a workroom or shed to store the company's materials that needed storing. Again, Mr. Smith found work for Mr. Cope to do on this site even though no permanent power was established. This is understandable because the six month closing period was not a factor.

13. Mr. Cope's evidence that when he arrived on the Lambton Generating site on January 15, 1993, he contacted the carpenters to get a scaffold built on top of the hoist and he took a few days getting all the elevator rails cleaned as they had laid around the site for two months. Doing this work would not have required permanent power.

14. These incidents support my contention that the employer through Mr. Smith made no real effort to keep Mr. Cope employed beyond the 24 week work period, if anything it was the other way around.

15. All of these actions or lack of action spell out one message loud and clear to all employees in the industry, and to Mr. Cope in particular. That is, that if you have attained industry-wide seniority with your company, you had better not reject a recall when we call the union hiring hall, even if it is only for a two day job because you will be dead in the water with your recall rights and seniority gone and you will not get these back when control over your employment opportunities is at our sole discretion.

16. All of the above sets the stage for application of the Westinghouse case award which states:

Thus if the employer's selection of the grievor was made in a manner that demonstrates arbitrariness, discrimination or bad faith, arbitrators have remedied such conduct, unless there is clear language in the agreement to the contrary. At the root of this argument is that in interpreting any clause in a collective agreement such as Article 10.15 and 10.16 of the present agreement, the parties assume when such language is negotiated that the application of the provisions will be carried out in good faith by both sides. In the present case for the employer to claim that the exercise of the Management Rights under Article 2.03 (a) which can be exercised for manifestly obvious bad faith reasons, ie; to prevent the grievor from the benefit of Article 10.15 is to put an interpretation on Article 10.15 of the collective agreement which the parties cannot be said to have agreed to.

17. I therefore find that the selection of the grievor for layoff in both of the two last layoffs was in order to prevent his rights and benefits under Article 10.15 from fastening again with the respondent employer. This violates the language and the intent of Article 10.15 of this collective agreement and I award the remedy requested for the above reasons.

4514-93-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 and International Brotherhood of Electrical Workers, Local 353, Applicants v. Labourers' International Union of North America, Local 506, **Ellis Don Ltd.**, Groff and Associates Ltd., and The State Group Ltd., Responding Parties v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, Intervenor #1; International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervenor #2

Construction Industry - Jurisdictional Dispute - Various unions, including Labourers' union, disputing assignment of certain clean up and "housekeeping" work on construction sites in Oakville and Toronto - Board distinguishing between removal, daily clean up, periodic general clean up and final clean up and between trade materials and debris - Board directing that all future clean up work on job sites in question be assigned in accordance with its direction

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.

APPEARANCES: James Fyshe, Jim Boyle, Lynn Marton and Glenn McDougall for the applicant and Intervenor #1; John Moszynski, Armando Camarra, Caroline Hart and Tony Doxale for Labourers', Local 506; Denis W. Ellickson for Intervenor #2; no one appeared on behalf of the responding employers.

DECISION OF THE BOARD September 12, 1994

1. This is a jurisdictional dispute complaint filed under section 93 of the *Labour Relations Act*.
2. Pursuant to the provisions of the section 93, the Board held a consultation on June 22, 1994. A consultation is not a hearing. A consultation provides the parties to a jurisdictional dispute with an opportunity to address the panel of the Board assigned to the case with respect the matters raised in it, as disclosed by the comprehensive briefs they are required to file in jurisdictional dispute proceedings. The consultation process is intended to be an expeditious means for dealing with jurisdictional disputes, which disputes often create labour relations problems, particularly in the construction industry. Although it is open to a panel to convert a consultation into a hearing and to hear evidence with respect to some or all of the issues raised in a jurisdictional dispute complaint, the Board's experience has been that it is rarely necessary to do so. On the contrary, since section 93 was amended to its present form effective January 1, 1993, the consultation process has proved to be an effective and expeditious means for dealing with jurisdictional disputes, without the need for hearing days of evidence, and in stark contrast to the ponderous jurisdictional dispute process in place prior to January 1, 1993. Indeed, a consultation usually takes less than a day and often concludes with an oral ruling (with or without reasons).
3. In this case, the Board did not render a decision at the conclusion of the consultation. The Board wished to consider the materials filed and the representations of the parties, including a suggestion that the Board should hear evidence of area and employer practice, perhaps some thirty years of it, before issuing a decision.
4. Employer and area practice are two of the factors often considered by the Board in jurisdictional dispute complaints. First set out in *Canada Millwrights*, [1967] OLRB Rep. May 195, the factors most commonly considered by the Board can be summarized as follows:

- collective bargaining relationships;
- skill and training;
- safety, economy and efficiency;
- employer practice and preference;
- area practice.

A review of the Board's jurisprudence reveals that this is not an exhaustive list, and that these or any other factors are not necessarily significant in every case. It is neither possible to make an exhaustive list of relevant factors, nor appropriate to mechanically apply some formula or list of factors to a jurisdictional dispute complaint made to the Board.

5. Some of the five factors listed above will be of little assistance in any given case. Indeed, in recent years, the work jurisdictions asserted by various trade unions in their collective agreements or constitutions (particularly in the construction industry) have become so broad that a consideration of this factor is often of little assistance. Because of this, the historical development of the division of work in the construction industry on a craft or trade basis, and the increasing overlap between the various trades and the jurisdictions they assert, the Board has recognized that "collective bargaining relationships" cannot, by themselves, be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no collective agreement with the employer which assigned the work in dispute may have a difficult time in having the assignment altered, a trade union which has a collective agreement with the employer which made the assignment will not necessarily be successful in fending off a claim for such work by a trade union which does not have a collective bargaining relationship with that employer (see, for example, *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143; *Piggott Construction Limited*, [1992] OLRB Rep. June 748 ("Piggott 2"). On the other hand, a single factor may be determinative of a jurisdictional dispute complaint. Work jurisdiction agreements provide one example (*Piggott 2*). In some cases, area practice will be determinative (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775; *Acco Canadian Material Handling*, [1992] May 537); although in other cases the Board has awarded the work in dispute to the trade union which that factor does not favour (see, for example, *Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352; *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185). In recent years, area practice has become a dominant factor in terms of the time and energy devoted to it in jurisdictional dispute proceedings. Indeed, the Board has said that: "It is the rare and unusual complaint in which the Board does not attach significant and primary weight to area and employer past practice"; and that "the real crux of most jurisdictional disputes revolves around these two past practice criteria". (*Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915). On the other hand, there are other cases in which the "practice" factors do not assist (see, for example, *Vic West Steel*, [1993] OLRB Rep. March 256, application for judicial review dismissed June 1, 1994 [now reported at [1994] OLRB Rep. June 803]).

6. In this case, the Board finds it appropriate to dispose of the jurisdictional dispute on the basis of the materials filed and the representations of the parties at the consultation. The Board is not persuaded that it is necessary to hear evidence with respect to any issue, including area or employer practice.

7. The work in dispute in this case is certain clean up and "housekeeping" work on construction sites at the Oakville Trafalgar Memorial Hospital in Oakville and the Princess Margaret Hospital in Toronto. The parties have provided various rather lengthy definitions of the work in dispute as follows:

- (a) By the United Association of Journeymen and Apprentices of the

Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 ("UA, Local 46") and the International Brotherhood of Electrical Workers, Local 353 ("IBEW, Local 353"):

The work which appears to be claimed by the Labourers concerns the general clean up of material and debris on the job sites. Periodically, the general contractor, Ellis Don Limited, will arrange with the subcontractors for a general clean up on a designated floor of the building under construction. Each of the mechanical, electrical etc. sub-contractors assign their own employees to the clean up. The employees are journeymen or apprentices of the particular trade.

The employees on the general clean up walk the floor picking up materials and debris that have been left behind from the work performed by their own sub-contractor (the plumbing, electrical etc. tradespersons respectively).

- (b) By the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853 ("UA, Local 853"):

Clean up of debris and material in relation to the installation of sprinkler systems (trade clean up) has always been part of the work performed by sprinkler fitters. It also has always been part of the work included in any bid by a sprinkler fitter contractor.

This trade clean up is usually performed by sprinkler fitters on a daily basis as they complete their work in a specific area. Debris is cleaned up and disposed of in a bin or similar container. Re-usable materials are piled in a neat and safe fashion. Tools are moved to the appropriate work station or are stored for re-use in that area. The final clean up of the work area, with a broom and shovel, is performed by Labourers in the employ of the general contractor.

If the trade clean up is not properly performed, the sprinkler fitter contractor will suffer a charge back from the general contractor.

It is not uncommon for the trade clean up to be done as part of an all trade clean up which is organized on a periodic basis rather than on a daily basis as outlined above. Once again, the final clean up, with a broom and shovel, is done by Labourers after the trade clean up has been completed. Once again, each contractor remains responsible for the clean up of its own debris and materials and will be charged back by the general contractor if the trade clean up has not been properly done.

Local 853 agrees with the submissions contained in the applicant's regarding the nature of the clean up work, the responsibility of subcontractors for clean up work, the significance of the Occupational Health and Safety Act in relation to clean up and the circumstances when a broom is used by tradespersons as presented in paragraph #2a), b), c), d) and e) of **Applicants' Brief**.

With respect to the Oakville job site clean up is being done by sprinkler fitters as they complete work in an area. Sprinkler fitters are not involved in any all trade clean up.

The situation is different at the Toronto job site. Sprinkler fitters do participate in an all trade clean up. Daily clean up is done, but debris is collected in different places and left for disposal at some future time as part of an all trades clean up. The primary reason for using this procedure is the difficulty in securing elevators. The Princess Margaret Hospital is a very tall project and there has been intense competition for the use of the elevator, which makes the daily disposal of debris difficult.

- (c) By Labourers International Union of North America, Local 506 (the "Labourers"):

12. The general description of the work is all clean up of work area at Ellis-Don's Oakville and Princess Margaret Hospital job sites, including but not limited to cleaning and clearing of all debris, removal of surplus materials or debris, sweeping, snow shovelling, collection and removal of all miscellaneous garbage, but not including the daily clean up.
13. The trades required to perform the work have varied, depending on which trades were on site as the work has progressed. **The other trades are performing clean up of surplus material and debris generated by workers other than their own members and are not performing only the daily clean up of their own material and debris.**
14. The work areas are being cleaned by different trades without regard to which trade has generated the majority of the material and debris. Plumbers for example, have been assigned to clean areas where the majority of the debris is concrete work. Electricians have been assigned to clean areas where the majority of the material was generated by Plumbers, Iron Workers or Sheet Metal Workers. Contrary to the statements made by the Applicants, the employees are not only cleaning up debris left behind by the contractor for whom they are working. Material generated by the trades is not being cleaned daily, but rather is being left to be cleaned weekly or bi-weekly whenever a general clean up is scheduled by Ellis-Don.
15. Local 506 recognizes that grievances have not been filed where members of the Applicants or the Intervenor have performed their own clean up prior to leaving the area or at least daily. In this case, clean up of material generated by various trades is not being performed daily, but rather weekly or biweekly by persons who are reassigned from the regular work of their trade to perform general clean up as part of a multi-trade crew made up primarily by employees of the sub-contractors on site supplemented with Labourers employed by Ellis-Don.

- (d) The International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (the "Asbestos Workers") agrees with the description provided by Labourers Local 506.

The employer parties chose not to file any materials. Nor did any of them attend the consultation. The Board therefor does not have the benefit of their perspective(s).

8. Upon considering the materials filed and the representations made at the consultation, it appears that the differences between the parties are rather slight. Unfortunately, as became apparent at the consultation, the trade unions have become lost in their own words, often using different words to mean the same thing or using the same words to mean different things, all resulting in a confusion with respect to where the differences between them actually lie. In the result, it appears that the trade unions agree that:

- (a) The work in dispute is the housekeeping clean up work which must be done on a construction job site in order to keep it safe. This includes the clean up, storage and removal of construction materials, and of the debris and garbage generated by construction work.
- (b) It is important to keep the construction sites in question clean and orderly.
- (c) A daily clean up should be done.

- (d) Each trade should perform the daily clean up of its own materials and the debris it has created in performing its work.
- (e) No trade should clean up materials used or debris generated by other trades.
- (f) The general clean up required on these construction sites is the work of the construction labourers.
- (g) The clean up on these job sites has been inadequate and that there are not enough construction labourers on the jobs to perform the necessary general clean up.

9. The areas of disagreement between the parties are as follows:

- (a) The Labourers assert that there have been periodic “all trades” clean ups in which members of various trades have been cleaning up materials used and debris generated by other trades. The other trade unions disagree.
- (b) The Labourers assert that if the trades fail to do their daily clean up, the clean up work becomes the work of the construction labourer. The other trades dispute this and assert that the work of cleaning up the respective materials and debris is always theirs, regardless of how long it takes them to get around to doing it.

In short, it appears that the crux of the dispute between the parties is where the line of demarcation between daily trade clean up and general clean up work should be drawn.

10. In the course of the consultation, the Board was referred to section 35(1) where the Regulations for construction projects under the *Occupational Health and Safety Act* (Ontario Regulation 213/91; R.R.O. 1990, Regulation 834). Counsel for UA Locals 46 and 853, and I.B.E.W. Local 353 submitted that neither this complaint, nor the Board generally, is a proper or appropriate form for enforcing the *Occupational Health and Safety Act* or Regulations. As far as it goes, that is probably correct. However, it is appropriate for the Board to consider this provision and to take it into account and disposing of this complaint, particularly in light of the second area of dispute between the parties.

11. Section 35(1) of the Regulations for construction projects under the *Occupational Health and Safety Act* provides that:

35-(1) Waste material and debris shall be removed to a disposal area and reusable material shall be removed to a storage area as often as is necessary to prevent a hazardous condition arising and, in any event, at least once daily.

In our view, this provision contemplates a daily clean up in the construction job sites; that is, that waste material and debris be removed to a disposal area (which might be on the job site and perhaps even in the work area), and that raw or reusable material be neatly stored on the job site (perhaps in the work area itself). There is nothing before the Board which indicates that such a daily clean up cannot be done, although it may not be possible, practical or necessary to actually remove waste, debris or material from either the job site or the various work areas on a daily basis.

12. Having regard to the materials filed and the representations of the parties, the Board concludes that:

- (a) It is quite irrelevant whether or not there is a “all trades clean up” practice since the real issue is who cleans up what and when.
- (b) It is not appropriate that “all trades” crews be assigned to do general clean up work, either daily or on some other periodic basis.
- (c) Each trade should perform a “trade clean up” on a daily basis.
- (d) The clean up or removal of construction materials, including surplus materials, either to an on-site storage area or off site should be done by the trade which uses those materials.
- (e) The clean up of debris within a work area should be done by the trade which generated the debris.
- (f) The removal of debris from a work area, either to an on-site storage area or off-site should be done by construction labourers on a daily basis as part of a general clean up.
- (g) Debris or surplus material which has been left behind by tradesmen who have left the work area for an extended period (i.e. for more than a few days) or permanently, should be cleaned up and removed by construction labourers.
- (h) General clean up, whether on a daily or other periodic basis, and the final clean up, as that term is understood in the construction industry, should be done by construction labourers.

13. The Board therefor finds that the responding employers Ellis-Don Limited, Groff and Associates Ltd. and the State Group Ltd. should have assigned the clean up work at the Oakville Trafalgar Hospital and the Princess Margaret Hospital job sites in accordance with the aforesaid; namely,

- (a) a daily clean up by the trade of the debris or garbage generated by and materials used by that trade;
- (b) a daily general clean up of debris or garbage by construction labourers;
- (c) a daily clean up of trade debris or materials left behind by a trade by construction labourers;
- (d) removal of trade materials by the trade which uses them;
- (e) removal of debris, however generated, by construction labourers;
- (f) any periodic general clean up and all final clean up by construction labourers.

14. The Board therefor directs that all future clean up work on the job sites in question herein be assigned in accordance with the aforesaid and specifically paragraph 12.

0418-94-M Communication, Energy and Paperworkers Union of Canada, Applicant v. Intercon Security Limited, Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Union filing complaint in respect of discharge of inside organizer and seeking interim reinstatement - Board not regarding three week delay in bringing application as substantial - Balance of harm weighing in union's favour - Board directing that employee be reinstated pending determination of complaint and that Board notice be posted in workplace

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

APPEARANCES: *Melissa Kronick, Kim Ginter and Stephen Ritchie* for the applicant; *Clifford J. Hart, Ray Harsant, Peter Lalonde, John Ranger and Gord Chizmeshya* for the responding party.

DECISION OF THE BOARD September 2, 1994

1. This is an application for interim relief pursuant to Section 92.1 of the Act.
2. At the hearing of this matter on May 10, 1994, the Board issued the following oral ruling:
 - a. The Board hereby directs that Intercon Security Limited forthwith reinstate Stephen Ritchie, on an interim basis, pending the final disposition of the unfair labour practice discharge complaint Board File No. 0417-94-U. We do not think it is appropriate at this interim stage, and we therefore decline to grant any order regarding compensation to Mr. Ritchie;
 - b. The Board further directs Intercon Security Limited to post the notice attached as "Appendix A" in prominent places in the workplace, where it is most likely to be seen by employees interested in these proceedings.
3. These are our reasons for that decision.
4. The facts in this matter were largely undisputed. The applicant union ("the union") had been campaigning to organize employees of the responding party ("Intercon") at their head office since the end of January, 1994. Intercon became aware of this activity shortly after it began, and as a result held a number of meetings with employees at the head office during February, 1994. Intercon also set out its views about unionization in a company newsletter issued in February, as it had done in previous issues in August and November, 1993.
5. Stephen Ritchie ("Ritchie") had been employed by Intercon since June, 1987. His most recent position was that of Shift Supervisor at the Weston Centre, where Intercon's employees provided security services to tenants occupying a 20-story multi-use building.

6. On the weekend of April 2 and 3, 1994, Ritchie learned of the organizing campaign at head office, and obtained telephone numbers for the union organizers.

7. On Monday, April 4, 1994, Ritchie was advised by a member of management at the Weston Centre, Peter Lalonde, that he was being suspended for two days. The suspension related to a break and enter and theft which had occurred at the premises of one of the retail tenants early in the morning of April 2, 1994, while Ritchie was on the midnight shift. Ritchie claims that he was told by Lalonde that he was being suspended for removing his memo book, which contained a report of this incident, from the premises, which was admittedly contrary to company policy. Intercon states that the suspension was imposed because of this infraction, and also because Ritchie failed to hook up a VCR which had been returned after repairs on March 31, 1994. Ritchie admits that he did not hook up the VCR, because according to him he was not permitted to do so without direct authorization; Lalonde claims that he gave him permission to do so the same day it was returned.

8. During the conversation with Lalonde on April 4, 1994, Ritchie commented on the union campaign at head office, saying words to the effect that unionization was inevitable, that situations like the suspension were the reason that employees wanted a union, and that unionization would spread once started. There was some conversation about whether or not Ritchie and/or other employees at the Weston Centre had or would be signing up with the union; Lalonde admits that he asked him whether or not he was "going union". Lalonde reported this conversation to John Ranger, Operations Manager, in a memo sent the same day.

9. On April 5, 1994, Ritchie spoke to other employees at the Weston Centre about the possibility of joining the applicant union, and it was decided that he would contact the union. He did so on April 6, and arranged to meet a representative of the union on April 7, 1994. Ritchie signed a card at that meeting, and obtained other membership cards and literature, which he distributed to employees at the Weston Centre on April 8 and 9, 1994.

10. On April 8, 1994, Ritchie met with Ranger to discuss his suspension. During this meeting he presented to Ranger a copy of one of two memoranda that he had removed from the drawer of a desk in the security office at the Weston Centre near the end of the evening shift on April 6, 1994. While not scheduled to work at that time, Ritchie was visiting the site to see if other employees coming off shift wanted to go out for a drink, which Intercon admitted is not unusual. While waiting for the other two employees, and while they were out of the office, Ritchie opened the desk, which he claims was open, and found two memos written by Lalonde about his suspension. Lalonde states that the desk is always locked, that it contains confidential client and employee information, and that no other employee is authorized to enter the desk.

11. Lalonde was alerted by Ranger that Ritchie possessed a copy of Lalonde's memo to Ranger, and he commenced an investigation into the matter. When he interviewed Ritchie on April 12, 1994, Ritchie admitted to having obtained the memo in the manner described by him above. On April 13, 1994, Lalonde advised Ritchie that he was being suspended immediately with a recommendation that he be terminated. The termination was announced officially later that day.

12. The applicant claims in a complaint made to the Board pursuant to section 91 of the Act that the responding party violated sections 2.1, 3, 65, 67, 71 and 82 of the Act by terminating Ritchie for his union activity. In the application for interim relief, they sought immediate reinstatement of Ritchie until the disposition of the unfair labour practice complaint. The main application and a related application for certification were filed together with the application for interim relief on May 5, 1994, and the hearing concerning interim relief was held on May 10, 1994. The hearing of the main application was then scheduled to begin on May 19 1994.

13. In numerous previous cases dealing with section 92.1, the Board has undertaken a two-step inquiry. First, the Board assesses, based upon the materials before it and assuming that the facts relied upon by the applicant are true, whether or not the applicant has made out an arguable case for the relief sought in the main application. If an arguable case is shown, the Board then balances the harm in not granting the interim relief sought against any harm which would result from granting it, in the context of the purposes and the scheme of the Act, to determine whether or not a remedy should be ordered. (See *810048 Ontario Limited c.o.b. as Loeb Highland*, [1993] OLRB Rep. March 197 at paragraphs 26, 33 and 34; *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242 at paragraphs 9 and 11; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019 at paragraphs 51 and 55; *J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145 at paragraphs 14 and 17).

14. After considering the allegations detailed in the declarations filed in the present case, we concluded that the applicant had made out an arguable case for the relief sought in the main application. At the time of his discharge, Ritchie was the key inside organizer for the union at the Weston Centre. He was discharged within 10 days of his first discussion with other employees at the site about joining the applicant union, and only a few days after he began to circulate cards for signature. As the Board stated in *East Side Mario's*, [1993] OLRB Rep. Aug. 744 at paragraph 9:

...

It is difficult to imagine circumstances in which the discharge of key inside union organizers during the early stages of an organizing campaign would not give rise to an arguable violation of the Act. This is not to suggest that every such complaint, or, indeed, the instant one, will succeed on the merits. That, however, is not the determination to be made in the context of an application for an interim order.

15. The Board in *East Side Mario's*, *supra*, also stated that they would have been satisfied that there was an arguable case even in the absence of evidence that the employer was aware of the organizers' activities, a fact which was disputed in that case. That is not the situation here, as there is no dispute that Intercon was aware of the union organizing campaign at the head office, and indeed had taken steps to respond to it, at the time of Ritchie's termination. Furthermore, the conversation between Ritchie and Lalonde on April 4, 1994, only a few days before the termination, clearly raised the spectre of unionization at the Weston Centre and revealed Ritchie's possible involvement in and likely support for such a campaign. This information was conveyed immediately to Ranger by Lalonde, who were both then involved in the decision to terminate Ritchie.

16. Turning to the second aspect of the inquiry under section 92.1, the balancing of harm, we note that the potential harm flowing from the discharge of a union organizer has been considered at length in numerous decisions of the Board, including *East Side Mario's*, *supra* at paragraphs 11 to 12, quoting *Loeb Highland*, *supra* at paragraphs 36 to 40, and *Tate Andale*, *supra* at paragraphs 42 to 44 and 56 to 58. This harm includes not only harm to an individual employee, which can generally be remedied through reinstatement combined with financial compensation, but more importantly, the chilling effect on other employees who may see the discharge as a warning not to become involved with the union. As noted in *Loeb Highland*, *supra*, at paragraph 40:

...

The combination of the economic vulnerability of employees and their assumption that an employer does not welcome a union means that a union organizing drive is a relatively fragile enterprise in which momentum is often critical. Where a campaign is disrupted by an unlawful discharge, the Board's jurisprudence under section 9.2 of the Act reflects the fact that such momentum cannot easily be restored by the reinstatement of an employee at some point farther down the road.

17. Given the early stage in the organizing campaign at the Weston Centre at which this conduct occurred, the small number of employees (nine according to the application for certification), Ritchie's key role in solicitation, and the employees' knowledge of the employer's likely reaction to a union campaign given the statements made in three newsletter articles in the past year, we had no difficulty in concluding that the potential harm to the union's organizing campaign was significant. Intercon urged us, however, to conclude that any such harm was outweighed by the harm to the company which would flow from even interim reinstatement of Ritchie.

18. The harm alleged by Intercon was that of having to employ an individual who might be guilty of what they characterized as a "breach of trust", in a sensitive position involving security services. They also suggested that having to continue to employ Ritchie might impact negatively on their relationship with third parties, that is the tenants for whom services are provided at the Weston Centre, as they would likely share Intercon's concerns. This latter argument was not particularly compelling in the circumstances of this case, however, as the incident which led to the termination did not relate to the provision of security services to tenants, in contrast to the earlier episode involving Ritchie's role in the investigation of a theft from a tenant which led only to a brief suspension.

19. Similar arguments have been made in previous discharge cases where serious misconduct on the part of organizers has been alleged. In *Loeb Highland, supra*, the Board noted at paragraph 43 that ordering reinstatement would mean that the company would have to employ an employee who admitted to lying about a theft from the employer, and who was alleged to have been involved in that theft, which can certainly be seen as a significant breach of trust. Nonetheless, the Board went on to conclude that this harm, particularly over the brief period prior to the start of the hearing in the main application, was less substantial than that likely to be suffered by the union, "having regard to the critical momentum of an organizing campaign and the corrosive effects of delay". The Board noted further that it was unlikely that the misconduct would be repeated in the interim. In *East Side Mario's, supra*, the Board reached a similar conclusion and ordered the reinstatement of employees whom the employer suspected of having participated in theft and/or threatened fellow employees. And in *Tate Andale, supra*, at paragraph 61 the Board concluded that the misconduct of one of the discharged employees which had been characterized by the employer as a theft was unlikely to be repeated, and was equally unlikely to provoke an outbreak of similar conduct by other employees, particularly during the brief period prior to disposition of the main application.

20. We were satisfied that these considerations applied equally here, and that as such the employer had not asserted any significant harm arising from an interim reinstatement. Intercon argued further, however, that in balancing the relative harms we should consider the impact of what they alleged was unreasonable delay on the part of the union in filing for interim relief. In essence, they asserted that the harm to the organizing campaign could not be as substantial as that alleged by the union given their lack of haste in coming to the Board, or in the alternative that the fault for any such harm now lay with the union.

21. The Board has considered delay as a relevant factor in determining the balance of harm in several previous cases. In *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358, an application was dismissed in part because of a substantial delay of 3 1/2 months in the filing of the application. The delay in that case was somewhat unique, as it occurred in part because amendments to the Act which introduced the Board's interim relief power came into effect approximately two months after the discharges in question. Nonetheless, the Board considered the delay relevant to the issue of harm, noting that the passage of time meant that the sensitive period of organizing had passed (the union had been certified 2 1/2 months prior to the filing of the interim relief applica-

tion) and that there was no real allegation of continuing harm in terms of the union's collective bargaining activities. Instead, the harm asserted related almost entirely to the financial impact on the individual employees who had been discharged, which the Board weighed against the harm which would result from having to remove the incumbents, who had been working throughout the period of delay, in the case of a reinstatement. It is also notable in *Morrison Meat Packers Ltd.*, *supra*, that the Board had commenced hearings on the main application some two months prior to the filing of the application for interim relief, with hearings continuing in that matter at the time of the interim relief hearing.

22. In a more recent case, *William Neilson Ltd.*, [1994] OLRB Rep. March 326, the Board considered the issue of delay in finding that significant harm would flow to the employer if interim relief was granted. The union's complaint in that matter related to a layoff of twenty-eight employees which occurred as a result of the employer's decision to contract out certain work. The union did not file its complaint with the Board for seventeen days after they were advised of the contracting out, during which time the employees were laid off, the subcontracting arrangements were implemented, and structural changes to the workplace involving significant cost were effected. Given these facts, the Board concluded that "the potential harm to the employer of an interim order of the nature requested by the union was effectively permitted to grow significantly by reason of the union's delay".

23. The Board in this case, then, confirms that delay may be a relevant factor in assessing the degree of harm suffered by one party where the passage of time increases the harm, as it did in *William Neilson Ltd.* In the present case, however, there was no claim that the harm to the employer had resulted from or had increased because of the alleged delay by the union, and indeed no intervening events appear to have occurred which would support a claim of that type. It is also important to note that the harm to the employer which was identified in *William Neilson Ltd.*, *supra*, was not being weighed against the potential harm to the union and to employees in the context of an organizing campaign, but rather against financial harm to individuals arising from layoff, which the Board found could be remedied adequately if not fully by way of compensation.

24. Turning then to the facts of the present case, the termination of Ritchie occurred at the end of the day on April 13, 1994. This application was filed, along with the main application under section 91 and the application for certification, on May 5, 1994. This delay, in the view of this panel, is not substantial. Furthermore, none of the circumstances which led to the findings concerning delay in *Morrison Meat Packers Ltd.*, *supra*, and *William Neilson Ltd.*, *supra*, are present here. For that reason, we concluded that any delay was not relevant to the balancing of harm in the circumstances of this case.

25. The union sought by way of interim relief an order reinstating Ritchie to his previous position, compensation for his losses, and a posting at the workplace. In *Tate Andale*, *supra*, at paragraph 58, the Board commented as follows on the most appropriate remedy for the discharge of a union organizer:

...(T)he most effective way to counteract the "message" of a summary discharge is an equally speedy reinstatement -accompanied by formal notification to employees of the terms and limits of such temporary reinstatement, as well as a summary of their statutory rights, in order (to use the words of the panel in *Radio Shack*) to "take account of the economics and psychology permeating the situation at issue". Indeed, in the context of an organizing campaign, where the certification application has not yet been disposed of, that Board response is particularly attractive, unless there are compelling employer interests that point in some other direction. During this sensitive period, labour relations realities commend this prophylactic approach.

26. For these reasons, we ordered reinstatement of the discharged employee, and the post-

ing of a notice, as detailed in paragraph 2 above. We did not, however, order compensation to Ritchie, as this is a remedy which does not relate to the harm which is sought to be redressed by this order for interim relief, namely the potential chilling effect on employees' right to express their wishes concerning representation by a trade union. The issue of harm to the individual employee can properly be dealt with by the panel hearing the main application once the issue of cause has been considered.

2240-94-M International Union of Woodworkers, Local 2693, Applicant v. Isadore Roy Lumber Limited, Responding Party

Final Offer Vote - First Contract Arbitration - Reference - Union's request for first contract arbitration under section 41(1.2) of the Act followed by employer's request for final offer vote under section 40 of the Act - Union objecting to final offer vote - Minister of Labour referring issue to Board for its advice - Board advising Minister that *Labour Relations Act* not establishing any scheme of priority as between requests under sections 40 and 41 of the Act - Board finding no incompatibility in operation of sections 40 and 41 - Minister advised that final offer vote should proceed on usual terms

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. W. Pirrie* and *B. L. Armstrong*.

APPEARANCES: *James Fyshe* and *Wilfred McIntyre* for the applicant; *K. R. Valin* and *Bert Roy* for the responding party.

DECISION OF THE BOARD September 30, 1994

1. This is a reference from the Minister to the Board pursuant to section 109 of the *Labour Relations Act* regarding a union request for first contract arbitration pursuant to section 41 of the Act and an employer request for a last offer vote pursuant to section 40 of the Act.

2. The terms of reference are as follows:

1. The Union requested first contract arbitration in accordance with section 42 (1.2) of the *Labour Relations Act* from the Minister on August 29, 1994. This request was received in the course of ordinary mail on September 7, 1994.

2. On August 31, 1994, the employer requested the Ontario Labour Relations Board to proceed with a last-offer vote in accordance with section 40 of the Act. This request was delivered by courier and received September 1, 1994.

3. The union objected to the request for last-offer vote during a telephone conversation subsequently confirmed in writing on September 14, 1994. They claimed the union had not received a copy of the last offer. The employer sent correspondence to the Ministry dated September 13, 1994 indicating the last-offer was sent to the union.

4. Both sections 40 and 41 of the *Labour Relations Act* require the Minister to take action and as such the Minister has directed the Labour Relations Board to hold a last-offer vote. This vote is scheduled for October 3, 1994. First contract arbitration has commenced and the parties have selected nominees for this process.

5. The Minister is of the view that it would be appropriate to refer to the Labour Relations Board the question of whether to proceed under sections 40 and 41 simultaneously or whether one section takes precedence over the other.

6. Accordingly, the following questions are referred to the Labour Relations Board for its advice:

- (i) Given that the Minister has directed that a last-offer vote be held and such is scheduled for October 3, 1994 should the vote proceed and if so on what terms, if any?
- (ii) Should the Minister proceed under sections 40 and 41 simultaneously?
- (iii) Does the application under section 40 take precedence over a request under section 41(1.2) or vice versa?
- (iv) Is the date of the receive of the application/request in this proceeding determinative of its priority?

7. The Minister requests that this matter be dealt with in an expeditious manner and that specifically the question under paragraph 6(1) be dealt with on or before the date of the last-offer vote on October 3, 1994 and that if possible an interim decision of the Board be given on question 6(1) on or before October 3, 1994.

3. A hearing was held on September 29, 1994 to receive the parties' submissions on the issues raised by the reference. It appears to the Board, and it appeared to the parties, that the central issue raised by the reference is whether the *Labour Relations Act* establishes any scheme of priority as between requests made pursuant to sections 40 and 41 of the Act. In our view this question must be answered in the negative. Both requests, regardless of the dates on which they were made or received, must proceed in the normal course.

4. As noted in the terms of reference, section 40 of the Act is expressed in mandatory language. Once a request for a final offer vote is made, other than in the construction industry, the Minister "*shall* ... direct that a vote of the employees to accept or reject the offer be held ...". Likewise, once the prerequisites for the operation of section 41(1)(a) are established, section 41(1) *requires* that a "first agreement be settled by arbitration". Apart from the limited circumstances set out in section 41(6), neither the Minister nor the Board is accorded any discretion as to the operation of this provision.

5. There is also no incompatibility in the operation of the two provisions. A vote in favour of the employer's final offer does not result in a collective agreement. It simply provides the basis upon which, in "the usual case", a binding agreement between the employer and the trade union is to be entered into: *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583 at 1598. Whether the circumstances of this case are "usual" may need to be dealt with in the context of a further proceeding, depending upon the outcome of the vote and, perhaps, the union's response.

6. On that basis, we answer the questions set out in paragraph 6 of the reference as follows:

- 6. (i) The last-offer vote scheduled for October 3, 1994 should proceed on the usual terms.
- (ii) The Minister should proceed under sections 40 and 41 simultaneously.
- (iii) The application under section 40 does not take precedence over a request under section 41(1.2), nor *vice versa*.

(iv) There is no priority as between requests made pursuant to sections 40 and 41 of the Act.

7. More extensive reasons may follow.
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1671-94-R The Canadian Union of Public Employees, Applicant v. Kids Come First Child Care Centre of Vaughan, Responding Party

Bargaining Unit - Build-Up - Certification - Board rejecting employer's submission that it apply build-up principle and direct representation vote, rather than automatically certifying union enjoying support of more than 55% of employees in unit - At maximum, build-up would consist of five employees to the nine employees in bargaining unit at time of application - Board not finding it appropriate to take into account seasonal fluctuations in work force in applying build-up principle - Certificate issuing

BEFORE: *M. Kaye Joachim*, Vice-Chair.

APPEARANCES: *Brian Sheehan* for the applicant; *David M. Chondon*, *Nanci Cohen* and *Gudrun Bartolomeo* for the responding party.

DECISION OF THE BOARD September 20, 1994

1. This is an application for certification in which the parties have reached agreement on all matters in dispute with the exception of the build-up issue described below.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of Kids Come First Child Care Centre of Vaughan in the City of Vaughan, save and except Assistant Executive Director and persons above the rank of Assistant Executive Director, constitute a unit of employees of the responding party appropriate for collective bargaining.
4. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.
5. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards. The cards are signed by each employee concerned and indicate a date within the six month period immediately preceding the application date. The membership evidence is supported by a duly completed declaration verifying membership evidence.
6. The Board is satisfied on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on August 11, 1994, the certification application date, had applied to become members of the applicant on or before that date.

Build-up Issue

7. Notwithstanding the fact that the applicant had more than fifty-five per cent support of the employees in the agreed upon bargaining unit on the application date, which would ordinarily result in automatic certification, the responding party has requested that the Board exercise its discretion to order a representation vote on the basis that the employees in the bargaining unit at the time the application was made were not a substantial and representative part of the work force which is expected to be employed within a reasonable time.

8. The facts are not in dispute. The responding party operates a non-profit child care centre which offers two programs: a program for pre-school children on a full-time or part-time basis (the "child care program"); and a program for school age children before and after school (the "school age program").

9. The child-care program operates for twelve months a year. The school age program operates for only ten months of the year in conjunction with the school year from the beginning of September to the end of June. Accordingly, during the summer months of July and August, two employees providing care in the school age program are traditionally laid off. In addition, one employee is generally laid-off from the child care program due to the decreased demand for this service during the summer months.

10. In addition to this seasonal decrease during July and August of 1994, the school age program will be expanded for the 1994/95 school year by up to thirty children. Based on a statutory requirements of at least one caregiver for every fifteen children, this created a need for two additional part-time positions for the 1994/95 school year program.

11. In addition, as a result of the resignation of one of the employees in the bargaining unit subsequent to the application date, an assistant educator in the child-care program was hired.

12. Therefore, the parties are agreed that the following changes to the number and composition of the bargaining unit have occurred. On the certification application date of August 11, 1994, there were nine employees in the bargaining unit. One employee in the bargaining unit resigned and has been replaced. Five new employees will have been added to the bargaining unit by the end of September, 1994, three as a result of the usual seasonal increase in September and two as a result of the expanded school age program. Thus, by the end of September 1994, there will be fourteen employees in the bargaining unit.

13. All of the nine employees employed in the bargaining unit on the application date were part of the childcare program. There were no employees of the school age program employed on the application date. Of the five additional employees, four will be employed in the school age program.

14. The employer argues that recent changes to the preamble in the *Labour Relations Act* emphasize a legislative concern for "the right of employees to choose, join and be represented by trade union of their choice" (section 2.1 of the current *Act*). The employer made four arguments about the substantially unrepresentative nature of the bargaining unit. First, the group employed at the time of the application is not numerically representative of those expected to be employed in the bargaining unit. There were nine employees at the time of the application and there will be fourteen employees by the end of September, an addition or build-up of five employees. There has been a replacement of one of the employees in the bargaining unit. Combining the additional and replacement workers results in a change in the composition of the employees in the bargaining unit of over forty per cent.

15. Second, at the time of the application the school age program employees, who will comprise four out of fourteen of the ultimate bargaining unit, were entirely unrepresented on the application date.

16. Third, the applicant submitted membership cards for six of the nine employees in the bargaining unit on the date of the application. At best therefore, the applicant would have six out of fourteen membership cards in the ultimate bargaining unit.

17. Fourth, a build-up of five employees in a small work force should be considered significant.

18. The applicant denies that the changes in the preamble support the responding party's argument. To the contrary, the applicant argues that the emphasis in the current Act on the application date strengthens the applicant's argument that the significant date in a certification application is the application date and lessens the significance of the build-up argument.

19. The union notes that the build-up policy is an extraordinary measure which has been used by the Board only in rare cases when the bargaining unit is not numerically representative of the work force. The union argues that factually this situation does not fall within the test set out by the Board for exercising its discretion to order a representation vote as a result of a build-up.

20. The Board has exercised its discretion to order a representation vote where the employees employed in the bargaining unit on the application date do not constitute a substantial representative number of employees in the ultimate bargaining unit. The policy behind the exercise of this discretion is summarized in the case of *Northland Power Partnership*, [1991] OLRB Rep. June 768 at paragraph 8:

The Board has recognized that there are circumstances in which it is appropriate to defer consideration of an application for certification. Where, for example, the Board is satisfied that an application is premature because a significant build-up of the workforce will take place within a reasonable period of time, the Board may defer consideration of the application, and order that a vote be taken at a time when a substantial representative number of employees are at work. This "build-up principle", as it is come to be known, represents an attempt to reconcile the right of present employees to exercise their rights under the *Labour Relations Act* and the right of future employees to do so (see for example, *R. ex rel. United Steelworkers of America et al v. Labour Relations Board (Saskatchewan)* and the *Random Mines Ltd.* [1970] (7d) L.R. 3rd 1, 69 CLLC para. 14,205 (SCC); *Champlain Forest Products Limited* [1972] OLRB Rep. May 399; *Inco* [1973] OLRB Rep. March 172). This principle has been applied in limited circumstances (see, for example, *Emile Frant and Peter Waselovich* 57 CLLC para. 18,057; *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846). More specifically, if the employees at work do not constitute a substantial and representative part of the workforce which is expected to be employed within a reasonable period, and the build-up does not depend upon factors beyond the employer's control, the Board may defer consideration of an application for certification or order a deferred vote.

21. Over the years the Board has developed some guidelines to assist it in balancing the rights of the two groups of employees described above. First, the Board requires that there be a real likelihood that a build-up will take place. Second, the planned build-up must take place within a reasonable period of time. Third, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If more than fifty per cent of the expected total are then employed, it is normally felt that the group is sufficiently representative and the Board will decline to exercise its discretion to order a representation vote. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and the Board exercises its discretion accordingly.

Fourth, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application (*F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 846 at paragraph 10; *Brick Brewing Co. Limited*, [1985] OLRB Rep. Nov. 1557 at paragraph 6; *Champlain Forest Products Limited*, [1972] OLRB Rep. May 399 at paragraphs 6 and 7; *GSW Inc.*, [1990] OLRB Rep. May 535 at paragraph 3; *Hawk Security Systems Limited*, [1993] OLRB Rep. August 751, paragraphs 19 and 22).

22. In this case it is not in dispute that a build-up will take place within a reasonable period of time. However, at the maximum, the build-up will consist of the addition of five employees to the nine employees in the bargaining unit at the time of the application for a total of fourteen. Thus, over fifty per cent of the anticipated number of employees were employed in the bargaining unit on the application date.

23. Even if the Board were to consider the change in the composition of the work force in that one further employee was hired to replace an employee who resigned since the application date, that would still result in eight of the employees continuing to be in the bargaining unit versus six new employees. The Board has always considered this to be sufficiently representative for certification purposes.

24. The Board is not persuaded that either the change in the preamble or the relatively small size of the bargaining unit are factors which would cause us to depart from the Board's established guidelines for determining whether the bargaining unit is sufficiently representative for certification purposes (see *Brick Brewing Company Limited*, *supra*, at page 1559 for an example of a similarly sized unit in which the above principles were applied; and see *Hawk Security Systems*, *supra* at paragraph 22 at page 756 for the effect of the emphasis on the certification application date since the Act was amended effective January 1, 1993.)

25. Nor is the Board satisfied that the fact that the four school age program workers were not employed on the application date makes the unit sufficiently unrepresentative for certification purposes.

26. With respect to the employer's argument that the summer is not the most representative time period to determine employee wishes, the Board understands this to a variation of the argument that the school age program employees are seasonal workers. The Board has consistently held that it will not take into account seasonal fluctuations in a work force in applying the build-up principle. See *Filkon Food Services Limited*, [1981] OLRB Rep. Dec. 1771 at paragraph 4:

The alteration of physical premises, however, has never been a factor in the Board's application of its "build-up" principle. Rather, the Board's sole concern is whether the employee complement at the time of an application for certification is "representative" of the full complement on an ongoing basis (see e.g. *Atlantic Packaging*, [1980] OLRB Rep. Feb. 158, paragraphs 8 and 9). What the respondent is relying upon in this case is a purely seasonal fluctuation in its work force, involving the increased use of students in the summer. The Board has never held that an application for certification which includes summer students must be brought in the summer. More importantly, the Board has consistently refused to take into account seasonal fluctuations in a work force, from the point of view of either "build-up" or bargaining-unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.*, [1976] OLRB Rep. May 215). The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is occurring in the present case, albeit for the first time because this is the first year the respondent will be operating on a "seasonal" basis.

See also *R.J.R. MacDonald Inc.* [1992] OLRB Rep. Feb. 195 at paragraph 21.

27. Finally, with respect to the employer's argument that the applicant is not in a position of automatic certification in the *anticipated* bargaining unit, the Board has never considered this as a bar to the granting of a certification application. See for example, *Brick Brewing Company Limited, supra*.

28. A certificate will issue to the applicant.

1616-94-JD Ontario Nurses' Association, Applicant v. Lambton County Health Unit and Canadian Union of Public Employees, Local 1291, Responding Parties

Jurisdictional Dispute - ONA submitting that one of two persons occupying newly created Health Promotion Officers positions, both of which had been assigned by employer to CUPE bargaining unit, should be reassigned by Board to ONA's bargaining unit - Board determining that matter properly the subject of arbitration and not the subject of jurisdictional dispute - Application dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *S. C. Laing* and *B. L. Armstrong*.

APPEARANCES: *Aileen Ashman* and *Colleen Ionson* for the applicant; *James T. Heather* and *Cindy Thayer* for Lambton County Health Unit; *B. Sheehan*, *Bill Nichol*, *Karen Hatjoulis* and *Theresa Huger* for Canadian Union of Public Employees, Local 1291.

DECISION OF THE BOARD September 15, 1994

1. This is an application under section 93 of the *Labour Relations Act* which states in part:

93.- (1) This section applies when the Board receives a complaint,

- (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another; or
- (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another.

(1.1) The Board may consult with the parties affected by the complaint to resolve any matter raised by the complaint or may inquire into any matter raised by the complaint, or may do both.

A consultation was held in this matter on September 7, 1994.

2. It was the essence of the applicant's position at the consultation that one of the two persons occupying the two newly created Health Promotion Officer positions, both of which had been assigned by the employer to the CUPE bargaining unit, should be reassigned by the Board to the applicant's bargaining unit. The basis for the claim was that the individual in question was a registered nurse, and the scope clause of the applicant's collective agreement provides as follows:

The Employer recognizes the Association as the exclusive bargaining agent for all Registered

Nurses and Graduate Nurses employed by the Employer save and except Assistant Supervisors and those above the rank of Assistant Supervisor.

The scope clause in the CUPE collective agreement states:

The Employer recognizes the Canadian Union of Public Employees and its Local 1291 as the sole and exclusive bargaining agency for all employees, covered by Schedule A of this agreement, save and except (certain named positions) and Registered and Graduate Nurses covered by the Ontario Nurses Association agreement.

3. The Board was also advised that a grievance had been filed in respect of the employer's conduct and that an arbitration had been scheduled for June 7, 1994 in which all three parties expected to participate. That hearing was adjourned, however, at the applicant's request pending the filing and determination of this application.

4. After hearing the parties' submissions on the question of whether this matter was properly the subject of a jurisdictional dispute, rather than an arbitration under the applicant's collective agreement, the Board gave the following oral ruling:

Having regard to the fact that the issue in dispute in this case appears to be into which bargaining unit a particular individual falls based on their status as a Registered Nurse and the scope clause of the applicant's collective agreement, rather than which trade union has the right to claim the performance of particular work, the Board is of the view that the matter is not properly before us as a jurisdictional dispute.

5. Accordingly, the application is dismissed.

1834-94-R United Steelworkers of America, Applicant v. Marchelino Restaurants Ltd. c.o.b. as Marchelino Restaurants, Responding Party

Bargaining Unit - Certification - Membership Evidence - Employer operating restaurant in downtown Ottawa - Union seeking municipality-wide bargaining unit - Employer proposing site-specific unit - Board finding union's proposed unit appropriate - Union submitting card bearing no indication as to date on which it was signed - Board hearing evidence with respect to circumstances of signature on membership evidence and satisfying itself that card signed within six month period preceeding application date - Certificate issuing

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *S. C. Laing* and *G. McMenemy*.

DECISION OF THE BOARD September 28, 1994

1. The style of cause of this proceeding is amended to reflect the correct name of the responding party employer, "Marchelino Restaurants Ltd. c.o.b. as Marchelino Restaurants".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. The applicant seeks to represent the employees of the responding party employer, who

operates a restaurant in the downtown Ottawa area. Although the parties had resolved the substantial majority of the issues relating to this application, at the hearing of this matter on September 19, 1994, the Board received the parties' submissions concerning the appropriateness of the municipality-wide bargaining unit sought by the applicant. The responding party operates only one restaurant in the Ottawa area. At the hearing, counsel on behalf of the employer submitted that the location - specific nature of its operation was such as to warrant an exception to the Board's usual practice of granting an applicant municipality-wide bargaining rights. Instead, it was asserted that the geographic scope of the union's bargaining rights ought to be restricted to the street address of the restaurant establishment. After considering the submissions of the parties, the Board made the following oral ruling:

We have considered the submissions of the parties and have concluded that the responding party has not presented us with reasons why we should depart from our policy regarding the availability of a municipality-wide unit to the applicant in circumstances where the responding party operates out of only one establishment in that municipality. (See *T.R.S. Food Services Limited*, [1980] OLRB Rep. Apr. 542.) Moreover, the employer has not demonstrated that, were the applicant's proposed bargaining unit to be accepted, it would experience serious labour relations difficulties as has been elaborated in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. Accordingly, the employer's objection to the applicant's bargaining unit is dismissed and the bargaining unit scope will extend to the City of Ottawa.

5. Having regard to the foregoing and to the agreement of the parties, the Board finds that:

all employees of Marchelino Restaurants Ltd. c.o.b. as Marchelino Restaurants in the City of Ottawa, save and except District Manager, Store Manager, Assistant Manager, Floor Manager, Bar Manager and persons above the rank of District Manager, Store Manager, Assistant Manager, Floor Manager, Bar Manager and office and clerical staff,

constitute an appropriate unit for collective bargaining.

6. In addition, upon the Board's usual inquiries into the membership evidence submitted by the applicant in support of this application, it was discovered that the membership application document with respect to an employee whose name appeared on the list of employees supplied by the responding party, although apparently signed by that employee, did not bear any indication as to the date upon which it was so signed. The Board heard evidence with respect to the circumstances of the signature of the membership evidence, and satisfied itself that, in fact, the card was signed by the employee within the six month period preceding the application date. We therefore ruled that the applicant could rely upon the documentary evidence in support of the application.

7. Having so ruled, it was determined that there were no further irregularities with respect to the remaining documentary evidence filed by the applicant. The application for membership cards are signed by each employee concerned, are dated within the six month period immediately preceding the application date, and are supported by a duly completed Declaration Verifying Membership Evidence.

8. Upon being so advised, and having previously been made aware of the state of the "count", the parties resolved their remaining disputes regarding the employee status of certain persons. Accordingly, the parties agreed that both Paul Muise and Jeff Davies, who are employed in the position of "Team Leader", are excluded from the operation of the provisions of the Act because they perform managerial functions within the meaning of section 1(3) of the Act.

9. Therefore, on the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit at the time the certification applica-

tion was made were members of the applicant on August 25, 1994, the certification application date, or had applied to become members of the applicant on or before that date.

10. A certificate will issue to the applicant.

4171-93-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Reynolds-Lemmerz Industries, Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Employee - Practice and Procedure - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of *res judicata* or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

APPEARANCES: *Stephen Krashinsky*, *Raj Dhaliwal*, *Catherine Gilbert*, *Bruce Davidson* and *Dan MacPherson* for the applicant; *Philip J. Wolfenden*, *Jim Gray* and *Ray MacPherson* for the responding party.

DECISION OF THE BOARD September 1, 1994

1. This is the continuation of an application for certification.

Background

2. By decision dated March 28, 1994, the applicant was certified on an interim basis for a unit of the responding party's employees. The precise scope of the unit was the subject of disagreement between the parties, and a Labour Relations Officer was appointed to inquire into and report to the Board on the duties and responsibilities, and the community of interest with the rest of the bargaining unit, of persons employed in certain disputed classifications. The parties waived their right to a formal hearing.

3. Subsequent to the March 28 decision, the Board received a letter from an employee, copied to the employer, suggesting that a fraudulent membership card may have been submitted on his behalf. In correspondence dated April 5, 1994, the employer referred the Board to the employee's letter and submitted that if the contents of the letter were true, the application should be dismissed or, at the very least, a vote should be held. The employer's letter also made reference to other correspondence it believed the Board may have received from employees indicating that the union was guilty of "threats, intimidation, coercion and lies" in its organizing campaign. It was the employer's view that a hearing should be held to deal with these issues. By letter of the same date, the union objected to the employer's request and directed the Board's attention to a section

91 complaint it had filed on March 28, 1994, alleging that the employer had engaged in improper communications with employees following the waiver process and the release of the count, and had encouraged them to come forward with allegations that cards had been signed under duress and as a result of false promises.

4. Over the course of the next few weeks, the Board received numerous representations from employees suggesting that the union may have filed fraudulent membership evidence on their behalf. Also received were: a section 91 complaint filed by the employer complaining of certain conduct by the union (principally the filing of fraudulent membership evidence) and requesting the rescission of the interim certificate; a request for reconsideration by the employer of the March 28, 1994 decision based on essentially the same grounds as the section 91 complaint and the April 5 letter; a request from the employer seeking the precise level of membership support in the bargaining unit reflecting the possible outcomes of the matters referred to the Board Officer; and a request by the union for the Board to determine certain issues related to the proper scope of the Officer's examinations.

5. By decision dated May 2, 1994, the Board scheduled a hearing for May 17 to deal with these various matters. The parties were advised that the Board had conducted its usual investigation into the allegations of fraud and that one such allegation, that made by Jeffrey Platt, required a hearing. Thereafter, the union was provided by the Board with sample signatures of Mr. Platt to enable it to undertake a handwriting comparison with the signature on the membership card. Over the objection of the union, the employer was also provided with a copy of Mr. Platt's membership card to enable it to undertake its own handwriting analysis. Subpoenas were then issued to Mr. Platt, the card collector and the Form A-4 declarant.

6. At the commencement of the May 17 hearing, the Board was advised by the parties that they had agreed to deal first with the fraud allegation, and that the resolution of that issue might go some way towards disposing of the other issues. The union then advised the Board that the preliminary report prepared by its handwriting expert supported the conclusion that the same person signed the membership card as signed the other documents bearing Mr. Platt's name. In order for the expert to complete her report, however, original signatures would need to be reviewed. Accordingly, the union requested, and was provided by Mr. Platt with, certain original documents (e.g., driver's licence). With leave of the Board, and with no determination having been made as to whether the Board would receive such evidence, the hearing was adjourned to May 18 to enable the expert to complete her report. At that stage, the employer indicated that it would not be attempting to call any expert handwriting evidence of its own.

7. When the hearing resumed on May 18, 1994, counsel for the union provided the Board, the employer, and Mr. Platt with a copy of the expert's report which confirmed her preliminary findings. After giving the employer and Mr. Platt the opportunity to review the expert's report, and when the hearing resumed at 11 o'clock, counsel for the union suggested that Mr. Platt might wish to meet with a Labour Relations Officer to consider whether it was still his intention to pursue the fraud allegation and, thereby, "perjure himself before the Board". Mr. Platt and the employer agreed to this procedure and the hearing adjourned briefly while Mr. Platt met with a Senior Board Officer. Shortly thereafter, Mr. Platt advised the Board verbally and in writing that the fraud allegation was withdrawn.

8. At the conclusion of this process, the Board provided the employer with the information requested concerning the precise levels of membership support in the bargaining unit under the different scenarios, and the parties agreed to withdraw their respective section 91 complaints. The employer also agreed to withdraw its request for reconsideration of the interim certificate.

Before accepting those agreements, however, the Board advised the parties that one further non-sign allegation remained to be investigated and that a decision of the Board would not issue until that investigation had been completed.

9. On May 25, 1994, the Board issued a decision advising the parties that its investigation had been completed. The decision also recorded the parties' withdrawal of the various matters. On June 27, 1994, at the employer's request, the Board issued a further decision confirming that the *specific* fraud allegation mentioned by the Board at the May 18 hearing had been investigated and had been found to be without substance.

10. Since then, the Board has received another letter from the employer, this time requesting a vote in the bargaining unit under section 8(3) of the *Labour Relations Act*. Before reproducing the employer's letter and dealing with that request, the Board will address another issue that remains outstanding.

The Union's Motion Concerning the Scope of the Officer's Examinations

11. On May 18, 1994, at the conclusion of the matters indicated above, the Board heard the parties' arguments on the issue raised by the union concerning the proper scope of the Officer's examinations. Relying on an agreement reached between the parties in an earlier application for certification, the union took the position that the employer was attempting to "gerrymander" the bargaining unit.

12. In Board File #3588-92-R, an application for certification by the union dated March 9, 1993 was dismissed on May 20, 1993 following a vote. The Board's decision directing the vote reflected the parties' agreement on the status of persons occupying the classifications now in dispute, and is directly at odds with the employer's current position. The union argued that it was entitled to rely on that agreement for organizing purposes in the present campaign and that the employer ought not to be permitted to resile from it. According to the union, either or both of the doctrines of *res judicata* or issue estoppel apply.

13. As the parties well know, the Board takes seriously agreements reached in certification and other proceedings. The process of agreement is vital not only to the furthering of harmonious labour relations between the parties, but to the day-to-day functioning of the Board. For these reasons the Board looks with considerable disfavour on a party that seeks to withdraw from an agreement reached in good faith with another party to Board proceedings. In the present case, however, it is not apparent to us that the employer has entered into any agreement, or made any representations, upon which the union could reasonably rely in these proceedings. Nor has there been any adjudication of the issues raised that would give rise to the doctrines of *res judicata* or issue estoppel.

14. The employer's agreement to the bargaining unit description in the earlier proceedings was no doubt motivated by a variety of factors including, perhaps, strategic ones. We would be surprised if the union's agreement was not similarly motivated. However, absent some understanding that the bargaining unit description agreed to in the earlier proceedings was intended to bind the parties in any future application, any reliance the union placed on that agreement was entirely at its peril. Moreover, as was pointed out by the Board at the hearing, it is difficult to see what prejudice the union has suffered as a result of its alleged reliance on the earlier agreement, or what "gerrymandering" has occurred, given that the union has already been certified.

15. On that basis, the Board will not restrict its inquiry into the scope of the appropriate bargaining unit as requested by the union.

The Employer's Request for a Vote under Section 8(3)

16. The employer's request for a vote under section 8(3) of the *Labour Relations Act* is contained in a letter dated July 6, 1994, which states:

"Please accept this letter as a formal request by the Respondent for the Board to exercise its discretion pursuant to s.8(3) of the *Ontario Labour Relations Act* to direct a representation vote in circumstances where the Applicant has filed membership evidence of more than 55% of the employees in the bargaining unit. Our reasons for this request are outlined below:

1. Barely over the 55% Level of Support

The Applicant has conducted an intense campaign of over five and one half years (5 1/2) in duration. During that period of time, at least one (1) other union was actively involved in organizing the employees of the Respondent. In May of 1993, the Applicant finally achieved sufficient membership support for a secret ballot vote. The results of that vote showed a significant majority of the employees at Reynolds-Lemmerz were not in favour of being represented by the CAW. Between the date of that vote, and the date of the second Application for Certification, the Respondent is unaware of any events that would have caused a significant shift in the attitude of its employees. In fact, the only significant change was an increase in the intensity of the organizing efforts of the union. Nevertheless, until shortly before the new Applicant, all indications were that the union had achieved little success in improving its membership position. The Respondent was therefore not surprised that union support was barely over the minimum requirements of the Ontario Labour Relations Act for automatic certification. In fact, one (1) card would have made the difference between automatic certification and a secret ballot vote after this five and one half (5 1/2) year campaign.

2. Fraudulent Card Allegations

A number of allegations of fraudulent cards were filed by employees with the Board. In fact, a hearing was convened at the Board to consider the card of one (1) individual, but under what he considered to be unusual and intense pressure at the Board, he withdrew his allegation at the last minute. The Board advised the parties at that hearing that an additional card had yet to be investigated, and neither of the parties have received communication from the Board with respect to its determination on this matter. In addition, we are aware, as is the Board, that one (1) card was signed by an individual who was not in the bargaining unit at the time of signature, and who was advised, and in fact did, put a falsified job title on the card. Despite that fact, the Board has accepted that card apparently on the basis the individual was in the bargaining unit at the time the Application was filed. That does not change the fact the card was fraudulently completed at the time of signature.

Furthermore, discussions as recently as a week and one half ago both within and outside the plant continue to be regular and consistent that at least twenty (20) fraudulent cards were filed with the Application. In fact, Ms. Kim McPherson, a well know [sic] supporter and organizer for the union advised a fellow employee, Lina Sheffer, as described above.

3. Appropriate Communication With Employees was Prevented

We are referencing the Interim Application the Union filed. Therein, the Applicant complained that a Notice from the Respondent to its employees was contrary to the *Ontario Labour Relations Act*. In that notice the Respondent had attempted to explain the significantly revised provisions of the *Ontario Labour Relations Act* as a result of Bill 40 in which employees would no longer be permitted to change their minds about membership following the filing of an Application for Certification. As the Board knows, prior to Bill 40, employees were clearly advised in the Notice of Application for certification that they had a right to file a Statement of Desire in opposition to the union should they have changed their mind following the signing of a card. The Applicant argued, and that panel of the Board accepted, that this notice was inappropriate. The Board went on to order the removal of these notices, and thereafter, the Respondent was precluded from explaining the Board process well in advance of the Application date.

Prior to the filing of the Application for Certification, a number of employees attempted to retrieve their cards from the Applicant and were refused. Additionally, we are advised the Board received a number of Statements of Desire indicating persons who had previously joined the union no longer wished to remain members of the union. However, those statements were received following the date of the Application, and were therefore refused by the Board. In our respectful submission, all of those Statements of Desire would have been properly filed but for the above described decision which precluded the Respondent from explaining the current state of the law to its employees and their legal rights.

In these circumstances, it is respectfully submitted the only appropriate course of action is for the Board to provide the employees of the Respondent with a fair opportunity to express their true wishes through a secret ballot vote, and we would therefore ask the Board to direct such a vote at the earliest possible time.

The Board is also in receipt of a response by the union to the employer's letter, and a reply from the employer to the union's response, neither of which need to be reproduced.

17. Section 8(3) of the *Labour Relations Act* states:

8.-(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

18. This provision enables the Board to direct the holding of a representation vote notwithstanding that an application for certification is accompanied by documentary evidence of membership signed by more than fifty-five per cent of the employees in the bargaining unit. Given the policy choice in favour of accepting signed membership cards as evidence of employee wishes and the high standard of integrity demanded of such evidence, section 8(3) is treated as an exception to the rule of "automatic certification". Accordingly, the Board will only direct a vote under this provision for compelling reasons and on the basis of cogent evidence, neither of which exist in the present case.

19. The concerns set out in the employer's request appear to be essentially the same as those which animated its April 5 letter, its section 91 complaint and its request for reconsideration of the interim certificate - the last two of which were withdrawn together with the union's section 91 complaint. The letter contains unparticularized and imprecise allegations of fraud, without any suggestion as to whether they are different from the ones already investigated by the Board, or withdrawn by the employer, or if they are different, why they could not have been raised previously.

20. With respect to the allegation concerning Lina Sheffer, the Board wishes to draw the parties' attention to the following correspondence, purportedly from Ms. Sheffer, directed to the Registrar of the Board, dated July 11, 1994:

"I understand Mr. Phillip Wolfenden representing Reynolds Lemmerz, has used my name and that of Kim McPherson, in his argument regarding the possibility of fraudulent cards being submitted to the Labour Board in C.A.W.'s attempt to organize the Collingwood operation.

I want to go on record with the Board and apologize for anything I have said in social conversation to fellow employees, that may have lead to this allegation. I especially want to clarify relayed comments from a conversation with Kim McPherson. In retrospect, I may have drawn the inference of a possibility of fraudulent cards, however I had no real basis to make such a deduction. I have not had the opportunity to speak to Kim McPherson prior to writing this letter, however, it is my intention to contact her and apologize for involving her in what may appear to some people as an anti-union movement.

In conclusion, I am respectfully requesting that my name be removed from any list of potential witnesses regarding Union application cards and I have no evidence to offer the Labour Board."

21. The employer's request also makes mention of certain alleged refusals by the union to return signed membership cards to employees, and the filing of certain untimely petitions. In the latter case, the suggestion is that employees were, in effect, prevented from filing *timely* petitions through the combined effect of section 8(4) of the *Labour Relations Act* and a Board decision in the earlier proceedings finding certain of the employer's communications with employees to have been unlawful. Again, and quite apart from the absence of particularity with respect to these allegations and the fact that they are being raised by the employer only after the withdrawal of the other matters, these representations do not provide a basis for the exercise of the Board's discretion under section 8(3). Absent, perhaps, some representation on the part of the union that signed membership cards would be returned upon request, the union is under no obligation to surrender this evidence. Employees who wish to revoke their support for the union are permitted to advise the Board of their desire prior to the filing of the application for certification. The fact that an earlier attempt by the employer to inform employees of this right failed for other reasons does not taint the membership evidence in this case or provide the basis for a vote under section 8(3).

22. The employer's further assertion that "one (1) card would have made the difference between automatic certification and a secret ballot vote" also does not advance its case. In Ontario, unlike a number of other jurisdictions in Canada, the level of support required for automatic certification is set at fifty-five per cent, rather than a bare majority. The additional five per cent is intended to provide employers with some assurance, in the absence of a ballot box, that a majority of employees do, in fact, wish to be represented by a trade union. In this case, that level of support was achieved *even assuming that all of the employer's challenges to the bargaining unit ultimately prove successful*.

23. On that basis, and in light of the foregoing, the employer's request for a vote under section 8(3) is denied.

Revocation of Appointment of Labour Relations Officer

24. It appears to the Board that the parties have made little progress towards the resolution of the bargaining unit configuration issues since the date of the Officer's appointment. Accordingly, and to expedite the resolution of this matter, the Board hereby revokes the appointment of the Labour Relations Officer and directs the Registrar to schedule a hearing before a panel of the Board to address the issues that had been referred to the Officer. Not later than two weeks prior to the commencement of that hearing, the employer is required to file with the Board and the union particulars of its position as to the inclusion or exclusion of the members of the disputed classifications, including the details of their job functions and the basis for the employer's request. Within one week of the receipt of this material, the union must file a detailed response to the employer's position. The employer will also be responsible for ensuring the attendance of a representative of the disputed classifications on the first day of hearing, and is directed to advise the Board and the union in a timely way as to the identity of this individual.

25. This matter is referred to the Registrar.

0429-94-G International Union of Operating Engineers and its Local 793, Applicant v. Robert Hume Construction Ltd., Responding Party

Construction Industry - Construction Industry Grievance - Board finding that certain landfill operations work not work within the construction industry - Grievance dismissed

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Peacock*.

APPEARANCES: *Jack J. Slaughter* and *Mike Unsworth* for the applicant; *David L. Brisbin* and *Robert Hume* for the responding party.

DECISION OF THE BOARD September 20, 1994

1. The applicant (the "trade union") has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

2. The grievance alleges that from on or about December 20, 1993 and continuing, the responding party (the "employer") has been performing the work of constructing a landfill site in Moore Township. It further alleges that this work is covered by either the ICI provincial agreement between the applicant and responding party or the Sarnia Heavy Construction Association collective agreement between the same parties. Finally, it is asserted that the employer did not apply the terms and conditions of either of these collective agreements to the persons performing the work in issue, did not use members of the applicant to perform that work, and seeks damages in that regard.

3. As a preliminary matter, the parties requested that the Board make a determination with respect to whether or not the work in issue was work in the construction industry. It was the position of the applicant that the work is work within the construction industry. It was the position of the employer that the work is non-construction.

4. The parties were able to enter into an agreed statement of fact which was filed with the Board. A number of exhibits were also agreed to and filed.

5. The agreed statement of fact provides as follows:

1. Robert Hume Construction Ltd. ("Hume") operates heavy equipment, including scrapers, bulldozers, compactors and power shovels in both construction, primarily but not exclusively road building, and on various landfill sites.

2. Hume has Collective Agreements with the International Union of Operating Engineers, Local 793 ("Local 793") for Roadbuilding/Heavy Construction as well as the Provincial I.C.I. Collective Agreement and for a specific landfill site in Innisfil, Ontario (the "Innisfil Agreement"). These Collective Agreements are attached as Appendix "A" and "B".

3. Except for the Innisfil Agreement, Hume and Local 793 have specifically excluded landfill operations except for construction work on landfill operations -- see Letter of Understanding attached as Appendix "C".

4. Landfill operations have meant, in basic terms, the excavation, to varying dimensions, of open pits or cells within which waste is placed, the piling of such excavated soil in stockpiles on site to be used for such things as berming around the site and the capping of waste and, finally, the capping of the cell once it is filled with waste. This technique is generally used regardless of the location of the landfill or the type of waste. Some waste, such as household waste, is capped daily for sanitary reasons; other waste such as industrial or demolition waste may be capped either daily or less frequently, depending on the type of waste, weather conditions such as wind, etc.

5. Hume does not manage the various landfill sites on which it performs work. It does not manage or provide security services, does not operate the weigh scale, does not haul waste to the site, does not contract with users to either haul to site or to permit user haulage and access to the site. Rather, Hume only excavates the cells, pushes waste into the open cells from where it has been dumped by the user/hauler and then caps the waste either on an interim basis or as a final capping, as circumstances require.

6. Hume has been engaged in working on landfill sites for approximately 19 years.

7. In Lambton County, Hume performs work at various landfill sites including:

- Moore Township — approximately 50 tons/day;
- Sarnia — originally 400 tons/day; now approximately 200 tons/day;
- Sombra — sporadically, maximum 20 tons/day;
- Grand Bend — sporadically, maximum 20 tons/day;
- Brooke Township — sporadically, maximum 20 tons/day;
- Watord — approximately 200 tons/day;
- Unitec — originally 50 tons/day; now 500 tons/day;
- Petrolia — Hume no longer has this contract — was up to 100 tons/day.

As well, as referred to, Hume operates in the same manner at the Innisfil, Ontario site under a landfill Collective Agreement with Local 793, Appendix “B”. The average daily tonnage there fluctuates from a high of 200 tons per day to the current 75 tons per day.

All tonnages are daily averages with daily or weekly fluctuations and are subject to maximum average stipulated by the Ministry of Environment with the operator of the site; not directly with Hume.

All of the above sites involve essentially the same excavate, fill with waste and cap with excavated/stockpiled soil process on the part of Hume.

8. Because work at each site does fluctuate, particularly when a new cell is excavated, equipment is moved from site to site as needed. At larger sites, some equipment will normally remain on site continuously; on smaller sites, equipment is only moved on site as needed.

9. With respect to the Unitec site, the specific subject of the instant Application, Hume and the site owner and operator, Unitec Disposals Inc. (“Unitec”) have had a contractual relationship since May 31st, 1989. This relationship is based on a verbal understanding that Unitec pays Hume a fee as services are rendered for ongoing excavation filling and capping of cells at the waste site. The work which gave rise to this Application was performed by Hume and paid for by Unitec under this ongoing understanding. Unitec is an unrelated arms-length company with no corporate relationship with Hume other than this specified working contractual relationship.

In 1993, Unitec received approval from the Ministry of Environment to extend cells at the Unitec site down to 55 feet in depth from the previous depth of approximately 18 to 19 feet. This was part of an extension in the daily allowable tonnage from the previous 50 tons per day to 500 tons per day, again averaged. Because of this approved extension, Unitec authorized Hume, as part of its ongoing contracted services to excavate the cell to the new depth. As this cell was excavated, it was simultaneously being filled with waste newly arriving on site as well as waste previously excavated. In the latter case, the waste previously placed in the cell to a depth of approximately 18 feet was excavated, then the underlying soil was excavated to a depth of 55 feet, then the previously excavated waste, along with newly-arriving waste, was placed in the cell.

10. The 55-foot excavation, while deeper than that previously allowed, is not unusual. The Petrolia site at which Hume previously worked is also excavated to a 55-foot depth using the same techniques described in his Statement of Facts.

11. It is not unusual in landfill site operations to excavate waste and re-deploy elsewhere on site to make the most efficient use of the land available, subject to Ministry of Environment approval.

12. The amount of waste/soil excavated at Unitec is not unusually large. The only aspect different from other similar sites is that the excavation occurred in a relatively compressed period of time. Approximately 100,000 cubic yards of material were moved at the Unitec site over a two-month period covered by this instant Application; by comparison, at a slower pace, at the Sarnia site, approximately 400,000 cubic yards were moved over a three-year period.

13. As stated earlier, the reason for the compressed work schedule at the Unitec site and the subject of the instant Application was because of the Ministry of Environment granting a sizable extension of Unitec's daily average tonnage with the resultant need for additional available capacity to receive the increased tonnage.

14. Hume is paid by the various landfill operators, whether private or public, on a variety of bases. On some such as the Unitec site, it is a "cost plus" hourly arrangement; on some it has been on a tonnage basis; on some a basic lump sum with cost plus hourly basis for work over a contracted amount. Some have evolved from one system to another. All of the work performed by Hume for Unitec during the whole period of their contracted relationship has been on a cost plus hourly basis pursuant to a monthly invoice for time spent times the appropriate rate; the work in issue in this instant Application was paid on the same basis as part of a standard monthly invoice.

15. Attached as Appendix "D" is an excerpt of a landfill proposal tender by the City of Peterborough which did not lead to a contract with Hume. Attached as Appendix "E" is an excerpt of a Contract between Hume and the County of Lambton for the Sarnia landfill site. In both cases, a similar method of excavation of soil to create a cell, stockpiling excavated or additional material, filling the cell with waste and capping the waste-filled cell to specification is included. This is the same process of excavation, borrowing, filling and capping as utilized at the Unitec site and other sites listed in Paragraph 7. The only difference between the Unitec site and the two sites covered by Appendix "A" and "E" is the requirement under Appendix "D" and "E" for daily covering for sanitary reasons due to the vermin/odour problems associated with household waste.

16. Surveying on site is not done to ensure physical adherence to the specifications set out in the site diagrams which is, beyond general compliance, irrelevant. Rather, surveying is done to establish the amount of soil and/or waste excavated, placed in the cell, stored and subsequently used for capping to establish a record of work performed for subsequent payment calculations as well a compliance with Ministry of Environment stipulations with respect to allowable daily waste tonnage, capping, etc.

17. Forming part of this Statement of Facts is a collection of photographs, separately indexed, which illustrates the following:

- (i) the Unitec site during the period covered by the instant Application;
- (ii) the Unitec site in July of 1994;
- (iii) the Innisfil site at an unspecified time but during the period that the Innisfil Agreement between Hume and Local 793 has been operating;
- (iv) the Watford site in July of 1994;
- (v) the Petrolia site in July of 1994;
- (vi) the Sarnia site in July of 1994.

18. For Workers' Compensation purposes, waste site services as performed by Hume are covered by Rate Group Number 570. Construction is covered by various Rate Groups in the 700 series -- Roadbuilding and Excavating, for example, being covered by Rate Group 711.

19. In Lambton County, there are at least two (2) Collective Agreement between Unions, including Local 793, and competitors of Hume which specifically deal with landfill operations. These are not construction Collective Agreement. The parties to the two Collective Agreements are:

- (i) K & E Solid Waste Management and Christian Labour Association of Canada; and
- (ii) Laidlaw Environmental Services and International Union of Operating Engineers, Local 793.

6. The letter of understanding referred to in paragraph 3 of the agreed statement of facts provides:

LETTER OF UNDERSTANDING

Between:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

“Union”

-and-

ROBERT HUME CONSTRUCTION LTD.

“Employer”

In consideration of the Collective Agreement entered into between the Union and the Employer in the standard format for Lambton County based contractors, the parties hereby agree as follows:

1. The terms and conditions of the aforementioned Collective Agreement shall not apply to persons engaged in landfill operations save and except the said terms and conditions shall apply to persons employed to perform construction work in connection with landfill sites.

DATED AT SARNIA THIS 15TH DAY OF OCTOBER, 1993.

7. In addition to that statement, two additional facts were stipulated. D. E. Kay Construction performed excavation work on a landfill site in the vicinity of London, Ontario under its local non-ICI construction agreement with Local 793. Further, that Ken Jackson Construction also performed excavation work on the Unitec site (the same site in issue here) under the predecessor to the Sarnia Heavy Construction agreement in 1988-89.

8. Having received the statement of facts and appendices to it and the agreed to exhibits, the panel adjourned to review them, following which it raised some questions with the parties, resulting in agreement on further facts.

9. The applicant currently holds bargaining rights for employees of the responding party in the following bargaining units:

- (a) all employees of Robert Hume engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily

engaged in the repairing and maintaining of same, and those employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman

- (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and
 - (ii) in all other sectors of the construction industry in Ontario Labour Relations Board Areas 1, 2, 3, 4, 5, 6, 7 and 26.
- (b) all employees of Robert Hume engaged in pit operations in the Province of Ontario, save and except foremen and persons above the rank of foreman.

10. The pit operations referred to in subparagraph (b) above cover gravel and aggregate pits.

11. The applicant filed an excerpt from the Daily Commercial News setting out a contract description for a landfill site in Waterloo Region. The work that is referenced in that contract was done under a local non-ICI agreement with Local 793. The work of that contract is described as being:

PROJECT: Cell NE1 & Perimeter Leachate Collection System. Work includes construction of a perimeter leachate collection system and new landfill cell, Cell NE1, for future disposal of refuse, including cell excavation, engineered clay liner, leachate collection system, access road, maintenance road and a tarping area.

12. With respect to paragraph 15 of the agreed statement of fact, there was no evidence whether or not the tender issued by the City of Peterborough was done pursuant to any collective agreement. The contract between Hume and the County of Lambton for the Sarnia landfill site was not performed under any collective agreement. The work to be performed was set out in that contract as follows:

1.01 WORK INCLUDED

all work to be performed under this contract will be supervised by the Engineer and must be performed to his satisfaction and be carried out in accordance with the Certificate of Approval for the Sarnia Landfill Site: Regulation 309 of the Province of Ontario: Ministry of the Environment Guidelines for Sanitary Landfill Operation: Plans for the Sarnia Sanitary Landfill: By-laws of the City of Sarnia-Clearwater.

The limits of this Contract will be the property boundary of the Landfill Site unless otherwise noted i.e. Litter Control, Subsection 3.04 and Leachate Treatment Facility, Subsection 1.02.

Generally, the Contractor shall perform all services that are required to provide a complete system of Landfill Site operations and maintenance. These services will include:

- a) Grading and compaction of refuse.
- b) Excavation, haulage, placement and compaction of daily and interim cover soil.
- c) Inspection, maintenance and repair of on-site access roads, secondary access roads and haul roads, including adjacent ditches and swales, excluding the supply of gravel.

- d) Layout of active disposal areas to conform with the Contract Documents.
- e) Provide and maintain mobile litter defencing, to control litter in and around the active disposal area.
- f) Provide and maintain proper slopes to drain borrow areas, so as to minimize standing water.
- g) Waste segregation where applicable.
- h) Provide emergency stockpiles of cover soil adjacent to active disposal areas.

1.02 WORK NOT INCLUDED

Work not included in this contract will consist of:

- a) the performance of the groundwater monitoring program,
- b) any works associated with the on-site Leachate Treatment Facility, unless otherwise directed by the Engineer.

13. In clarifying the work that was performed that is in issue in this grievance, there was no dispute that in order to move from the eighteen feet depth to the fifty-five feet depth only excavations were required. There was no other necessary work in respect of drainage or liners. This is not a sanitary landfill site.

14. Exhibit 9 was entered as a rough drawing of the site. On the site was an existing depression, created as a result of a pond being drained. That area was available to be filled but had not as yet been utilized. On approval from the Ministry of the Environment to extend the depth of the site to fifty-five feet, excavation commenced in or about January of 1994 to deepen that depression from eighteen to fifty-five feet. That work occurred over a period of approximately two months and it is that work that is the subject matter of the grievance.

15. As material has been shifted into that fifty-five foot area, the remainder of the site is gradually being dug down to the fifty-five foot level with essentially, the area behind it being back-filled with both old fill and new waste. That work is ongoing and the applicant is not claiming that aspect of the work in this grievance.

16. It was the position of the applicant that the work performed over the two month period claimed is properly work in the construction industry. It argues that this work goes beyond the scope of the normal operation of a landfill, in that the site is being made three times deeper, resulting in an overall tenfold increase in daily tonnage. It notes that approximately 100,000 cubic yards of material was moved over a two-month period compared with approximately 400,000 cubic yards over a three-year period at the Sarnia site. The purpose of that work was to achieve a sizable extension of the site in order to achieve the increased tonnage. The applicant argues that when a significant amount of work is performed over a short period of time and is undertaken to increase the capacity of the landfill those operations that increase capacity are characteristic of construction activity. In this regard, the applicant relies on the decisions of the Board in *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 and *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613.

17. In addition, the applicant made reference to other Board decisions arising the context of the mining industry, as analogous to the operation of a landfill site involving excavation work. From all these cases, the applicant argues that by analogy, where there is a substantial increase in

capacity and expansion of the site, that represents work in the construction industry. How one substantially adds to capacity with respect to a landfill site is simply by digging a bigger hole which work was done during the two month period in question.

18. The applicant further argues that the Letter of Understanding entered into between the parties contemplates that there would be construction work done in connection with landfill sites. It also refers to the excavation work performed by Local 793 in respect of D. K. Construction, Ken Jackson Construction, and the Waterloo Sanitary landfill site.

19. In response, the employer did not take issue with the *Master Insulators'* and *Abitibi-Price* line of cases as a general proposition. However, it asserts that they were not applicable in the circumstances. The employer noted that in those cases the initial work performed was clearly work in the construction industry. What was in issue was work performed sometime later that in some way changed the initial construction. In this case construction work was not the initial starting point. It notes that this employer has a construction business separate and apart from its landfill contracts and is bound by a number of collective agreements with respect to that construction work. It notes that the Letter of Understanding primarily excludes landfill operations from construction work. While it agreed that there may well be construction work contemplated in connection with landfills, that conclusion was not warranted in these circumstances.

20. The employer noted that in many of the sites set out in the statement of fact the capacity to the landfill site had been increased. The only difference with the Unitec site was the speed with which that work was done following approval to go to fifty-five feet. If the Board were to adopt the construction/maintenance analogy the employer argues, then *any* excavation would constitute an expansion of capacity and even the applicant admitted that that was not the case. The employer argues that the work in question was all part of a continuum, that is, a landfill operation.

21. In reply the applicant argues that the starting point is not that of a landfill operation but rather the work of excavating, which it argues is *prima facie* work in the construction industry. It noted that although the same work was being performed over the period as part of the landfill operation, by analogy to the decision in *Abitibi Price*, *supra* the same work of producing paper was being performed in that case. However when production was expanded it was treated as construction work and should be in this case as well.

22. The parties are agreed that if this work is work within the construction industry, the Board remain seized with respect to any other issue arising in the grievance. They further agreed that if the work is found not to be work in the construction industry, the grievances are to be dismissed.

23. As noted in paragraph 3, the question that the parties posed to the Board was whether the work in issue was work in the construction industry, and not whether the work was covered by either of the collective agreements referred to in the grievance. In addition, while we note the applicant's argument that the starting point for consideration ought to be consideration of the fact that the work involves excavation, these parties have entered into an agreement concerning landfill operations. That letter of understanding distinguishes between landfill operations and construction work in connection with landfill sites. Inherent in that agreement is the acknowledgement by the applicant that not all excavation work in connection with landfill sites will be treated by it as work within the construction industry. Therefore the more appropriate starting point in our view is the question of how these parties have defined landfill operations. Also in that context, the references and suggested analogies to the caselaw are of limited assistance.

24. Referring to paragraph 4 of the agreed statement of fact, these parties have agreed that:

Landfill operations have meant, in basic terms, *the excavation, to varying dimensions, of open pits or cells within which waste is placed, the piling of such excavated soil in stockpiles on site to be used for such things as berming around the site and the capping of waste and, finally, the capping of the cell once it is filled with waste. This technique is generally used regardless of the location of the landfill or the type of waste....*

[emphasis added]

25. The work in issue is described at paragraph 9 of the agreed facts:

.... Because of this approved extension, Unitec authorized Hume, as part of its ongoing contracted services to excavate the cell to the new depth. *As this cell was excavated, it was simultaneously being filled with waste newly arriving on site as well as waste previously excavated.* In the latter case, the waste previously placed in the cell to a depth of approximately 18 feet was excavated, then the underlying soil was excavated to a depth of 55 feet, then the previously excavated waste, along with newly-arriving waste, was placed in the cell.

[emphasis added]

26. We are of the view that the work in issue falls within the parties' own agreed description of what constitutes landfill operations, which they have, pursuant to the letter of understanding between them, distinguished from construction work performed in connection with landfill sites. On that basis, we cannot conclude that the work in issue here was work in the construction industry.

27. The grievance is therefore dismissed.

0569-94-U Canadian Union of Public Employees, Local 2816, Applicant v. The Hospital for Sick Children, Responding Party

Change in Working Conditions - Hospital Labour Disputes Arbitration Act - Interference in Trade Unions - Unfair Labour Practice - Board dismissing union's complaint alleging that hospital employer violating Act by instituting new benefits plan for non-unionized employees and raising long term disability premium for union's members

BEFORE: Laura Trachuk, Vice-Chair, and Board Members W. H. Wightman and E. G. Theobald.

APPEARANCES: M. Wright, L. Morris, S. Eadie, C. McQuarrie, M. Roman, D. Abuan, J. Villeneuve for the applicant; R. Budd and C. Hoover for the responding party.

DECISION OF THE BOARD September 13, 1994

1. This is an application under section 91 of the *Labour Relations Act* alleging that the responding party (sometimes referred to in this decision as the "hospital") has violated sections 65, 67, and 81 of the Act by instituting a new benefits plan for its non-unionized employees and raising the long term disability premiums for the applicant's members.

2. The collective agreement between the parties expired in September 1993. The applicant (sometimes referred to in this decision as the "union") gave notice to bargain on July 12, 1993. The parties are in the "freeze" period described in section 81(1) of the *Labour Relations Act* and sec-

tion 13 of the *Hospital Labour Disputes Arbitration Act* (HLDAA). In April, 1994 the hospital implemented a new benefits scheme for its non-unionized staff. One of the results of this new scheme was that the non-unionized staff and the union's members were placed into two different groups for the purposes of the long term disability (L.T.D.) plan. The effect of this division into two groups was that the premium that the applicant's members are required to pay for L.T.D. was increased. The union claims that the hospital's action discriminates against its members contrary to sections 65 and 67 and also that it is a violation of the statutory "freeze" contemplated by section 81.

3. The relevant sections of the Act provide as follows:

65.No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

...

67.No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

...

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

4. Although neither party mentioned the *Hospital Labour Disputes Arbitration Act* we understand that it also applies in this situation. The relevant sections of that Act provide as follows:

1.-(1) In this Act,

- (a) "hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;
- (b) "hospital employee" means a person employed in the operation of a hospital;
- (c) "Minister" means the Minister of Labour;
- (d) "party" means the trade union that is the bargaining agent for a bargaining unit of hospital employees, on the one hand, or the employers of such employees, on the other hand, and "parties" means the two of them.

(2) Unless the contrary intention appears, expressions used in this Act have the same meaning as in the *Labour Relations Act*.

(3) A laundry that is operated exclusively for one or more than one hospital shall be deemed to be a hospital for the purposes of this Act.

(4) A stationary power plant as defined in the *Operating Engineers Act* that is operated principally for one or more than one hospital shall be deemed to be a hospital for the purposes of this Act.

2.-(1) This Act applies to any hospital employees to whom the *Labour Relations Act* applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

(2) Except as modified by this Act, the *Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

13. Despite subsection 81(1) of the *Labour Relations Act*, where notice has been given under section 14 or 54 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

Facts

5. There is little dispute between the parties with respect to the relevant facts in this matter. The hospital employs approximately 3,500 people, 500 of whom are represented by the appli-

cant. Aside from a bargaining unit of security guards, most of the remaining 3,000 staff are non-unionized. The union has represented the bargaining unit since 1985. The bargaining unit is described in the collective agreement as follows:

all employees of The Hospital for Sick Children in the Municipality of Metropolitan Toronto, save and except professional medical staff, Graduate and Undergraduate Nurses, Graduate and Undergraduate Pharmacists, Graduate Dietitians, Dietetic Interns, Social Workers, Child Care Workers, Play Park Attendants, Recreationists, persons engaged in research work, technical personnel, Supervisors, persons above the rank of supervisor, Foremen, persons above the rank of Foreman, Chief Engineer, Office and Clerical Staff, Security Guards, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation.

6. These parties have engaged in central hospital sector negotiations for the last three collective agreements and have signed an agreement to participate in the next round. (C.U.P.E. locals and the hospitals with which they have collective agreements choose prior to the negotiation of each contract whether they wish to opt into central bargaining. If both parties wish to participate a memorandum agreeing to be bound by the results of central bargaining is signed.)

7. Certain issues, including benefits, are negotiated centrally, others, usually those of local significance, are negotiated locally. Traditionally the central agreement is ultimately settled through interest arbitration. The last interest award was released in March 1993. It dictated the terms of the collective agreement which expired in September 1993. The parties have not yet exchanged their initial bargaining proposals for the next collective agreement.

8. The sections of the last central agreement which relate to insured benefits provide as follows:

13.01 - Sick Leave

• • •

- (g) All employees shall participate in the Hospital for Sick Children Long Term Disability Plan after twelve (12) months from date of hire providing for sixty percent (60%) disability income on the first \$36,000.00 per year of salary and fifty percent (50%) of salary in excess of \$36,000.00 per year. Coverage shall be subject to the terms and conditions of the Plan which does not form part of the Collective Agreement nor which is subject to the grievance procedure and arbitration. The employee shall pay the full cost of the monthly premium in effect from time to time through monthly pay-roll deduction.

18.01 - Insured Benefits

The Hospital agrees, during the term of the Collective Agreement, to contribute towards the premium coverage of participating eligible employees in the active employ of the Hospital under the insurance plans set out below subject to their respective terms and conditions including any enrollment requirements:

- (a) The Hospital agrees to pay 100% of the billed premium towards coverage of eligible employees in the active employ of the Hospital under the Blue Cross Semi-Private Plan or comparable coverage with another carrier.
- (b) The Hospital agrees to contribute 75% of the billed premium towards coverage of eligible employees in the active employ of the Hospital under the existing Blue Cross Extended Health Care Benefits Plan (as amended below) or comparable coverage with another carrier providing for \$15.00

(single) and \$25.00 (family) deductible, providing the balance of monthly premiums is paid by the employee through payroll deductions. Vision care maximum \$90.00 every 24 months and hearing aide allowance \$500.00 life-time maximum.

- (c) The Hospital agrees to contribute 100% of the billed premium towards coverage of eligible employees in the active employ of the Hospital under HOOGLIP or such other group life insurance plan currently in effect providing the balance of the monthly premium is paid by the employee through payroll deductions.
- (d) The Hospital agrees to contribute 75% of the billed premiums towards coverage of eligible employees in the active employ of the Hospital under the Blue Cross #9 Dental Plan or comparable coverage with another carrier (based on the current ODA fee schedule as it may be updated from time to time) providing the balance of the monthly premiums are paid by the employee through payroll deduction.
- (e) The Hospital will provide equivalent coverage to all employees who retire early and have not yet reached age 65 and who are in receipt of the Hospital's pension plan benefits on the same basis as is provided to active employees for semi-private, extended health care and dental benefits. The Hospital will contribute the same portion towards the billed premiums of these benefits plans as is currently contributed by the Hospital to the billed premiums of active employees.

The early-retired employee's share towards the billed premium of the insured benefit plans will be deducted from his or her monthly pension cheque.
- (f) A copy of all current master policies of the benefits referred to in this Article shall be provided to the Union.
- (g) The Hospital agrees to make available on an optional basis coverage of eligible employees in the active employee of the Hospital under the existing Accidental Death Plan with Citadel Insurance or comparable coverage with another carrier: the total premiums for which would be paid by employees through payroll deduction.

18.02 Change of Carrier

It is understood that the Hospital may at any time substitute another carrier for any plan (other than OHIP) provided the benefits conferred thereby are not in total decreased. Before making such a substitution, the Hospital shall notify the Union to explain the proposed change and to ascertain the views of the employees. Upon a request by the Union, the Hospital shall provide to the Union, full specifications of the benefit programs contracted for and in effect for employees covered herein.

9. Prior to 1990 the hospital self-insured its L.T.D. plan. In 1991 it began using Canada Life as its insurer. At the same time it considered instituting a "flex" benefit plan for its employees which would permit them to opt out of benefits. The hospital rejected the idea at the time because it did not have the administrative capability to support it.

10. In early 1993, the hospital gave Mr. Chris Hoover, its Pensions and Benefits Manager at the time, a mandate to save the hospital \$1,000,000.00 through the non-union benefit plan. In consultation with the hospital's consulting firm, Mr. Hoover devised the Core Plus Plan which was presented to the hospital in September 1993. The hospital decided to implement the proposal and a series of focus groups with non-unionized employees were held to discuss what changes they would like to see to the benefit package.

11. Canada Life was initially invited to quote on the plan and when its response was unacceptably high, other insurance companies were requested to submit quotes. The hospital received 10 quotes. Interviews were then conducted with a short list and then second interviews were held with an even shorter list. Ultimately in January, 1994, Metropolitan Life was chosen as the new insurer. Mr. Hoover testified that this choice was made on the basis of a number of criteria including the net cost of the Metropolitan Life plan versus the net cost of other insurer's proposals.

12. The Core Plus Plan provides a basic level of benefits which employees may upgrade to suit their particular needs. With each extra benefit the cost to the employee (and the hospital except for L.T.D.) increases. The Core Plus Plan was not offered to the union's members because, the hospital claimed, it must provide them with the benefits stipulated in the collective agreement on the terms contained in the collective agreement. However, it was acknowledged throughout the process that one of the effects of implementing the Core Plus Plan would be that the insurer would separate the union and non-union groups for the purpose of the L.T.D. plan and that this might affect the premium rates for the groups. Persons enrolled in a benefits plan share a group with those who have the same benefits and who pay the same percentage of the premiums. Thus, union and non-union employees were already in separate groups for the purposes of the extended health care plan (Article 18.01(b)) because the unionized employees had superior hearing aid and vision benefits. They were also already in separate groups for the purposes of the dental plan (Article 18.01(d)) because the hospital and the unionized employees had a 75/25 cost sharing arrangement whereas the non-unionized employees and the hospital had a 50/50 one.

13. Canada Life's contracts with the hospital generally expired and were renewed each April 15. The L.T.D. premiums had increased every year since 1991 as follows:

Jan. 1, 1991,	0.5%
April 1, 1991,	1.0%
April 1, 1992,	1.5%
July 1, 1993,	1.65%
May 1, 1994,	2.65%

14. The financial position of the benefit plans were reviewed by the hospital and the insurer every autumn. In September, 1993 Canada Life indicated to the hospital that the L.T.D. plan was in a deficit position and that a significant increase in premiums would be required. Although all of the employees were included in one L.T.D. group under Canada Life, it conducted (for reasons the hospital's witness could not provide) a separate financial analysis of the plan's position with respect to the unionized employees. The analysis indicated that the L.T.D. claims experience for the unionized employees was "very unfavourable" and warranted a premium increase to 3.23% of earnings if the Core Plan were implemented although it proposed setting the rate at 2.65%. If the Core Plus Plan was not implemented and all of the employees remained in the same L.T.D. group the premium would be increased to 2.3% of earnings. These rates would be subject to potential reduction through negotiation with the hospital.

15. When the hospital requested quotes from the other insurers it did not provide them with separate data for the union's members. As a result, the insurers provided the hospital with quotes for the L.T.D. premium based on a rate which reflected the experience of the employee group as a whole. A number of the insurers provided quotes for a premium rate for the unionized L.T.D. group which was significantly lower than the 1993/1994 rate from Canada Life. The rate quoted by Metropolitan Life was 1.84% and although one of the highest, it was still lower than the 1993/1994 Canada Life rate. However, after the hospital had engaged Metropolitan Life it negotiated the final rates and the rate for the union group was set at 2.65%. Mr. Hoover testified that the

rate originally quoted by Metropolitan Life after reviewing the unionized group's claims experience was 3.23% of earnings but that he negotiated it down to 2.65%. The unionized employees were informed of this premium increase and the change of carrier in April, 1994.

16. The premium that the union's members are now required to pay for L.T.D. is 1% higher than it was last year. This translates to between \$260.00 and \$300.00 per year for most members or between \$130,000.00 to \$150,000.00 per year for the whole group. There is no dispute that this increase would have been smaller if the union's members had not been placed in a separate L.T.D. group from the rest of the employees. If non-union employees choose the same level of L.T.D. coverage under the Core Plus Plan their premiums are less than those of the unionized employees.

17. When the local president inquired as to the reason for the premium increase he was advised that it was the "result of the number of claims and bad experience with employees who are covered by the CUPE agreement." He was also advised that "if the experience remains the same or is worse the rate will have to be increased again May 1, 1995".

18. As a result of the increase, the union's members are demanding that it make L.T.D. premiums an issue in bargaining. The union must therefore attempt to have the issue included in the proposals at central bargaining or get an agreement that it can be negotiated locally.

Argument

19. The hospital argued that it had not violated the statutory freeze or discriminated against unionized employees because the benefit package it provided to CUPE members had not changed and it continued to provide the benefits stipulated by the collective agreement. Furthermore, the premiums for L.T.D. and the costs of the other benefit plans have regularly gone up each year and therefore a rate increase was within the reasonable expectations of the employees. It noted that it had considered introducing a flex plan as early as 1991. It argued that the process undertaken by the hospital in implementing the Core Plus Plan indicated that it was motivated by legitimate business, not anti-union, concerns.

20. It was also asserted that it was the insurer's not the hospital's decision to separate the unionized and non-unionized employees into two groups for the purposes of the L.T.D. plan. The insurer would make that alteration whenever either the level of benefits or the contribution allocation of part of the group changed. The hospital noted that the same result would have occurred if an interest arbitrator ever dictated an employer contribution to the L.T.D. premium or a different level of benefits. Furthermore, the insurer sets the premium rate based on the experience rating of the groups which is not a factor within the hospital's control.

21. The hospital argued in conclusion that all of its actions with respect to this matter are permitted by the Act and it asked the Board to dismiss the application. The Board was referred to the following decisions: *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98; *Mohawk Hospital Services Inc.*, [1993] OLRB Rep. Sept. 873; *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316 and *Inco Limited*, [1984] OLRB Rep. Nov. 1584.

22. The union argued that the large increase in its members L.T.D. premiums was caused by the hospital's decision to implement the Core Plus Plan which resulted in the employees being split into two groups for the purpose of the L.T.D. plan. The union claimed that this combination of cause and effect was a violation of the freeze. It was the union's position that a premium increase even at this size would not be a violation if it had been caused by "business as before", i.e., by a rate increase by Canada Life for the group as a whole. The union argued however that in

these circumstances the size of the increase coupled with the reason for it was not within the reasonable expectations of the employees.

23. The union also argued that the hospital knew it was considering a flexible benefits plan prior to agreeing to central negotiations. In the union's view it should have been notified of the potential change in the non-bargaining unit benefit package. It also claimed that the hospital should have declined to participate in central negotiations so that it could negotiate a new benefit package with the union locally. It was argued that the hospital's actions have altered the "stable point of departure for collective bargaining" that section 81(1) was designed to protect.

24. The union also claimed that the hospital's actions discriminated against its members because the implementation of the Core Plus Plan was costing its members money while both the hospital and the non-union employees were saving money. It argued further that the increased benefits paid by its members were subsidizing the other benefit plans and that Metropolitan Life could afford to give the hospital a good rate on the other plans because of the extra premiums that it was getting from the bargaining unit members. The union claimed that the message to the bargaining unit members is that they are the hospital's lowest priority. It requested that the hospital be ordered to compensate its members for the difference in premiums between what Metropolitan Life was charging and the lowest rate for the whole group quoted to the Hospital or, in the alternative, the rate Canada Life would have charged for the whole group. We were referred to the following decisions: *The Brick Warehouse*, [1992] OLRB Rep. Oct. 1118; *George St. J. H. L. J. H. McCall Chronic Care Wing of the Queensway General Hospital*, [1991] OLRB Rep. May 619; *Forintek Canada Corp.*, [1986] OLRB Rep. April 453; *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261; *Umfreville District School Area Board*, [1987] OLRB Rep. March 434; *The Cambridge Reporter*, [1993] OLRB Rep. Oct. 1035.

25. In reply, the hospital argued that if the union's position was accepted it could not change the benefit plans it offered to non-unionized employees and that is beyond the Board's jurisdiction. The hospital denied that the premiums paid by the unionized employees are subsidizing the other plans and asserted that the plans are self funding and that premiums are set on the basis of experience ratings.

Decision

26. As noted above, we understand the parties in this matter to be governed by the *Hospital Labour Disputes Arbitration Act*. Section 13 of that Act is identical to section 81(1) of the *Labour Relations Act* except that employers are prevented from altering the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated. As a result of the overlap in the provisions in the two Acts, the Board's approach to alleged breaches of section 13 of HLDAA is the same as its approach under section 81(1).

27. Over time the Board has developed a number of approaches to assist it in interpreting section 81(1) of the *Labour Relations Act* or section 13 of HLDAA when there is uncertainty as to what the "rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, trade union or employees" are in a particular situation (*Royalguard Vinyl Co.*, [1994] OLRB Rep. Jan. 59). The "business as before" approach was described in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 at paragraph 23:

23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have

occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

28. The “reasonable expectations of the employees” approach was articulated in *Simpsons Limited* [1985], OLRB Rep. Apr. 594 at paragraphs 32 and 33 as follows:

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia*, *supra*; *Scarborough Centenary Hospital*, *supra*; *Oshawa General Hospital*, *York-Finch Hospital*, *supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited*, [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur every day. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons*, *supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

29. Both the “business as before” and the “reasonable expectations of employees” approaches contribute to an interpretation of section 13 which “recognizes that employment relationships tend to reflect the dynamic nature of business activity and is ... responsive to the variety of situations and bargaining relationships which are presented to the Board.” (*Mohawk Hospital*, *supra*, at para. 20.)

30. In these circumstances, the Board must determine the terms of the parties' agreement with respect to L.T.D. benefits. In other words, what are the applicant's members' and the hospital's rights and duties with respect to the L.T.D. package? Those rights and duties are clearly spelled out in the collective agreement. The hospital must provide a certain level of L.T.D. benefits and the applicant's members must pay 100% of the premium. There is no suggestion that the hospital has failed to provide the level of benefits required. However, the union is asking us to find that its members' rights with respect to L.T.D. also include the right to be part of a benefit group with all other hospital employees because that is what has happened before and what the employees would reasonably expect. Essentially the union is claiming that its members have the right to continue to enjoy the lower premiums which result from the better experience rating of the group as a whole. The Board cannot agree. The groups in which the insurer places the employees for the purposes of the various benefit plans is not part of the terms and conditions of employment or rights, privileges or duties of these parties. There is no right for the applicant's members to be in the same benefits group as non-unionized employees set out in the collective agreement. In fact,

the collective agreement between the parties stipulates that the terms and conditions of the L.T.D. plan is *not* part of agreement and is not subject to the grievance procedure.

31. We also do not find that the unionized employees enjoy the privilege of being part of the larger L.T.D. group. Unionized and non-unionized employees are in different groups for different benefits depending upon whether their benefits and premium share are identical. Where they are not, they are placed in separate groups by the insurer. Hence, the benefit package available to the unionized and non-unionized employees is different. The separation into two L.T.D. groups is part of this previous pattern.

32. The applicant's members have experienced premium increases every year since the hospital stopped insuring its own plan. The premium increase in 1994 while larger, is still part of that previous pattern. This pattern of periodic premium increases by the insurer constitutes business as usual and what the employees would reasonably expect and therefore the increase is not a breach of the Act. (See *Ottawa General Hospital, supra.*) The union's members are vulnerable to L.T.D. premium increases because of the provisions of the collective agreement which require them to pay 100% of the premium but leaves the choice of carrier to the hospital. For all of the above reasons, the Board dismisses the application with respect to section 81 of Act and section 13 of the HLDA.

33. Although the Board does not find that implementing the Core Plus Plan and increasing L.T.D. premiums for union members violated the freeze, the hospital's actions might still be in violation of the Act if its implementation of the Core Plus Plan was at least partly motivated by the desire to penalize union members. However, the facts do not support such a conclusion. The hospital had previously considered a flexible benefit plan and it reasonably revisited the concept as a way to cut spending during a period of budget cuts. The process that Mr. Hoover undertook supports the contention that the change was made for business reasons and the hospital appears to have acted on his recommendations. Furthermore, Metropolitan Life was chosen to be the new insurer *before* it was determined that the L.T.D. premiums for unionized employees would have to be increased. The premium quote which was used for the net costing upon which the decision to choose Metropolitan was made was lower than the 1993-1994 Canada Life rate. Therefore the evidence does not support a finding that the hospital decided to implement the Core Plus Plan or to choose Metropolitan Life even in part because of the effect on the premium rates for the union's members. Although Mr. Hoover knew that the experience rating for the union group alone was poorer than the rating for the employee group as a whole and that the separation into two groups might impact negatively on the union, we do not find that this knowledge was a factor in his recommendation or in the hospital's decision.

34. Not all differences in treatment between unionized and non-unionized employees amount to discrimination contrary to section 67(a). Unionization necessarily means that employees will be treated differently in many respects than their non-unionized colleagues. In these circumstances the union's members had historically enjoyed some superior benefits to their non-unionized colleagues. The hospital has not now decided to provide superior benefits to the non-unionized employees to undermine the union. All it has done is implement a system where non-unionized employees can choose to take fewer benefits at a lower cost. The hospital could not implement the same system for its unionized employees because it must provide a certain level of benefits under its collective agreement. This is not a difference in treatment even when it results in higher premiums for the union's members, which attracts the sanctions of the Act.

35. The wording of the hospital's letter to the union's president is unfortunate. As stated above it says "the increase in the L.T.D. rate is a result of the number of claims and bad experi-

ence with employees who are covered by the the CUPE agreement.” This might suggest to someone not familiar with the jargon of the insurance industry that it was the hospital’s personal experience with disabled union members not the claims history that was motivating the change. However, the Board finds that the letter meant that the increase was based on the claims history and did not mean it was a punishment for the bad behaviour of the union’s members. Therefore the Board finds no evidence that the hospital’s actions were motivated by anti-union animus.

36. It appears that the union’s real concern is that its members also want to be able to participate in the Core Plus Plan and its attendant cost savings. It is of course part of the collective bargaining scheme that union members must live under the terms of employment that their representatives negotiate. In these circumstances the parties are about to embark on bargaining a new contract so they are free to negotiate a different benefit package if they choose. The problem seems to be that the parties are engaged in central negotiations and the local union does not know if it can make flexible benefits part of the union’s proposal or whether the parties will be able to negotiate the issue locally. This kind of problem is inherent to a central negotiation process. The “pro” of such a scheme is that all the union’s members have the same terms and conditions of employment but the “con” of such a scheme is also that all the union’s members have the same terms and conditions of employment. Although the present situation may be awkward for the union, that is not a result of a violation of sections 65 or 67 by the hospital. The union suggested that the hospital should have told it that it was going to change to the Core Plus Plan before they agreed to central negotiations. However, while the hospital’s failure to notify the union may be a significant factor in the policy grievance that we understand the union has filed, the Board does not see anything in sections 65 or 67 of the Act which would require the hospital to advise the union that it was going to change the non-union employee benefit plan.

37. For all of the above reasons, the Board finds that the responding party has not violated sections 65, 67 and 81 of the *Labour Relations Act* or section 13 of the HLDAA. This application is therefore dismissed.

3574-93-U International Brotherhood of Electrical Workers, Local 636, Applicant v. The Hydro-Electric Commission of the City of Ottawa, Responding Party

Strike - Strike Replacement Workers - Unfair Labour Practice - Municipal electric utility’s “outside workers” striking - Employer using certain non-managerial replacement workers to perform struck work - Union alleging that employer violating Act by using non-managerial replacement workers from “another of the employer’s places of operations” to perform work of striking employees at “place of operations in respect of which strike taking place” - Board concluding that locations at which replacement workers were working during strike and places at which they ordinarily work not constituting separate “places of operations” within meaning of section 73.1(6)1 of the Act - Complaint dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *P. Hunt* and *J. Shields* for the applicant; *J. Emond* and *S. Bird* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR, AND BOARD MEMBER R. W. PIRRIE: September 14, 1994

1. The Hydro-Electric Commission of the City of Ottawa is the municipal electric utility that supplies power to the City of Ottawa, the City of Vanier and the Village of Rockcliffe Park. On January 17, 1994 its outside bargaining unit went on a lawful strike. On January 18, 1994 the union representing those employees brought an application under section 91 of the *Labour Relations Act* alleging that the Commission was violating section 73.1(6). This provision states in part:

73.1 (6) The employer shall not use any of the following persons to perform [the work of an employee in the bargaining unit that is on strike or is locked-out] at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.

2. According to the union, the Commission was using 11 non-bargaining unit/non-managerial employees from "another of the employer's places of operations" to perform the work of striking employees at "a place of operations in respect of which the strike ... [was] taking place".

3. The Commission responded with two arguments. First, it argued that it has only one "place of operations". Accordingly, none of the 11 replacement workers could possibly be performing work at a place of operations that was different from the one at which they ordinarily work. Second, the Commission argued that the 11 replacement workers were persons who exercise "managerial functions" and who do not ordinarily work at a "place of operations other than a place of operations in respect of which the strike [was] taking place".

4. Initially, the union rejected the Commission's assertion that the 11 replacement workers ordinarily exercise managerial functions. As the hearing progressed, however, it conceded that this was so with respect to six of them. The union also did not dispute the Commission's assertion that the managers ordinarily work at a "place of operations in respect of which the strike [was] taking place" within the meaning of section 73.1(6)2.

5. In a decision dated February 10, 1994, a majority of this panel dismissed the union's application for reasons to follow. The application was dismissed as it related to the six managers for the reasons submitted by the Commission. The union did not take the position that the managers ordinarily work at a place of operations that was not on strike; nor did it dispute the Commission's interpretation of section 73.1(6).

6. With respect to the five non-managerial replacement workers, the application was dismissed for the reasons set out below.

Facts

7. Ottawa Hydro purchases the vast majority of its power from Ontario Hydro. It receives this power at 12 transformer stations and reduces it to a usable voltage at 45 sub-stations located throughout its service area. The power is then conveyed to 135,000 residential, commercial and institutional customers via 750 kilometers of underground cable and 960 kilometers of overhead

cable. The underground cable runs through approximately 2,500 manholes, while the overhead cable is supported by approximately 25,000 Hydro poles. The hydro poles also support approximately 36,000 transformers and street lights. Members of the bargaining unit and others may be called upon to work on all of this equipment and at any number of these sites.

8. The Commission also operates two generating stations on Victoria Island in the Ottawa River. The generating stations draw power from the ChaudijH 2i re Falls and deliver it via an "electrical bus" to one of the Commission's 12 transformer stations where it is integrated with the power received from Ontario Hydro. The power generated by the ChaudijH 2h re Falls offsets an average of approximately \$10,177.00 in purchases from Ontario Hydro per day. This translates into a savings of approximately 0.5 per cent in the rate charged to Ottawa Hydro customers.

9. At the time of this decision, the union represented approximately 290 Ottawa Hydro employees. These employees were members of either an inside or an outside bargaining unit. The inside unit consisted of approximately 100 employees. The outside unit consisted of approximately 190 employees. Since the date of this application, these units have been combined by another decision of this panel.

10. The collective agreement for the outside bargaining unit contains approximately 18 classifications. The number of persons assigned to each classification varies from 75, in the case of the "lineman" classification, to one in the case of the "carpenter" and "body repairman" classifications. Linemen take care of the overhead and underground residential cable systems, while the carpenter and body repairman work primarily in the Commission's shops.

11. All but five members of the outside unit begin and end each working day at the Commission's 10 acre site on Albion Road. This site contains a three storey office building, an interior warehouse with adjacent stores, a pole yard, one of the 12 transformer stations, one of the 45 sub-stations, a garage, and a parking lot.

12. Of the approximately 185 bargaining unit members who begin and end each work day at Albion Road, several stay there for almost the entire day working in the service buildings. The others punch in and out at Albion Road but spend most of their time working "in the field" i.e. at various locations within the Commission's geographic boundaries, including those referred to in paragraph 7 of this decision and the generating stations.

13. The five bargaining unit members who neither start nor finish their days at Albion Road are employed at the Victoria Island generating stations, on a one person per shift basis. The output of the generating stations and the activities of the operator assigned there are supervised from Albion Road by the systems operator. The systems operator is also responsible for the activities of 12 other operators who share the classification of "travelling operator" with those assigned to the generating stations. Unlike the travelling operators assigned to the generating stations, the other travelling operators, in fact, travel - five within the east end of the Commission's territory and five within the west end. The two remaining travelling operators are in training. Apart from the individual assigned to the generating stations, only two travelling operators are on shift at any one time.

14. The systems operator monitors the entire electrical transmission and distribution system, including the output of the generating stations, from a "board" at Albion Road. This enables the systems operator to direct the travelling operator assigned to the generating stations to raise or lower output levels during the course of the day in accordance with fluctuations in demand. The systems operator is also responsible for providing work assignments to the two travelling operators who work in the east and west ends of the Commission's territory as they come on shift. He main-

tains radio contact with them, and with the travelling operator at the generating station, to make any re-assignments or to provide emergency instructions or advice.

15. There is no on-site supervision at the generating stations. The travelling operator assigned there typically spends most of the day working alone, monitoring the operations of the two generating stations from a panel at one of them. The operator also performs daily maintenance on the stations. One such task requires the assistance of another travelling operator who visits each day for that purpose. When the operator assigned to the generating stations is away on training, or is ill or on vacation, other travelling operators will fill-in.

16. During the summer months, the generating stations are shut down and employees from other classifications attend to perform a variety of repair, maintenance and upgrading tasks. Some employees will report directly to the generating stations during this period. Other less routine maintenance tasks are performed at the generating stations throughout the year, requiring the presence of additional crews. These crews may be made up of bargaining unit members, engineering/technical personnel and/or “managers”, all of whom are drawn from Albion Road.

17. The generating stations assignment is an entry level position within the travelling operator classification. The Commission’s practice is to keep an operator at the generating stations for no more than two years, before requiring them to travel in the field. Typically, the Commission also fills vacancies in the systems operator classification from among senior travelling operators.

18. With respect to the five non-managerial replacement workers still in issue, two worked at the generating stations during the strike. Two others made service calls at locations throughout the Commission’s geographic territory. The fifth performed underground cable locates wherever needed. Before the strike began, all five ordinarily started and finished their days at Albion Road, but each would go into the field with varying frequency and for varying amounts of time.

19. Gordon Cavanagh is a customer vault maintenance co-ordinator. Ordinarily, he spends approximately 80 to 90 per cent of his day in the field co-ordinating work on the Commission’s 800 customer vaults. During the strike, Mr. Cavanagh was one of the two employees making service calls to customer premises and dwellings.

20. Scott Edey is a street light technician who works in the field every day. Mr. Edey was the other employee making service calls during the strike.

21. Matt Clouthier is an underground and overhead distribution technician. Before the strike began, Mr. Clouthier worked in the field only slightly less often than Messrs. Cavanagh and Edey. During the strike, he performed underground cable locates.

22. Mark Holland is an “engineer, electrical distribution”. Ordinarily, he is involved in an underground wiring project in Ottawa’s downtown and market areas, and works there daily. During the strike, Mr. Holland worked at the generating stations.

23. Until approximately six weeks before the strike began, Mr. Holland’s position was occupied by Casey Malone. Mr. Malone is now involved in an automated mapping and facilities management project. Although this project will likely require him to work in the field less often than before, it was too early at the time of the hearing to say how much less often. Mr. jH Malone was the other employee working at the generating stations at the time of the strike.

24. During the strike, the union established pickets at Albion Road, the generating stations

and other work sites located throughout the Commission's territory, including some residential dwellings where service calls were being made.

Decision

25. The issue that remains in this case is whether any of the five non-managerial replacement workers that were performing bargaining unit work at "... a place of operations in respect of which the strike ... [was] taking place ..." ordinarily work at "another of the employer's places of operations" within the meaning of section 73.1(6)1. The Commission argues that it has only one place of operations, encompassing everything in its entire service area. This includes Albion Road, the field and the generating stations. The union argues that the Commission has a potentially limitless number of places of operations and, in any event, not less than those three. It also submits, implicitly, that the five non-managerial replacement workers ordinarily work at Albion Road, and that those they were replacing ordinarily work in the field or at the generating stations.

26. This is the first time the Board has had to consider the meaning of the phrase "place of operations". Neither party provided the Board with any material associated with the legislative process or any authorities from other jurisdictions to illuminate the meaning to be given to these words. The employer took the position, on the facts, that its operations were entirely integrated and that no single location could be meaningfully separated from the others for the purposes of section 73.1(6). The union, on the other hand, urged us to give effect to the purposes of the replacement worker provisions by adopting an approach that would enhance its ability to wage a successful strike by restricting the employer's ability to operate (See: *Canadian Red Cross Society*, [1994] OLRB Rep. Jan. 34 and *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270). On the facts of this case, the union said, that could reasonably be accomplished by finding Albion Road, the "field" and the generating stations to be separate places of operations, and by finding the places at which the replacement workers ordinarily work to be different from those at which they worked during the strike.

27. A majority of the panel was not attracted to the interpretive approach advocated by the union. As noted in *Red Cross*, "it is clear that [sections 73.1 and 73.2] do not purport to ban the performance of the work of striking employees absolutely". Instead, the Legislature has enumerated a complex set of restrictions having regard to such factors as: the place of operations at which the bargaining unit work is being performed; the date of hire, engagement or transfer of those performing it; the managerial, bargaining unit, non-managerial/non-bargaining unit or "third party" status of the replacement workers; and the place of operations at which the replacement workers ordinarily work.

28. In general terms, the employer will be under greater or lesser restrictions in the categories of personnel able to perform bargaining unit work depending upon whether the work is performed at the struck location or elsewhere. Dealing solely with the struck premises, and depending upon whether there is more than one such location within a single bargaining unit, the employer is permitted the greatest freedom in its use of managers, somewhat less freedom in its use of non-managerial personnel, and is precluded entirely from using bargaining unit members, non-managerial personnel who choose not to work, persons supplied by third parties, volunteers, and persons hired, engaged or transferred to the struck location after a specified date.

29. The primary reasons underlying the recent introduction of the replacement worker provisions, as noted in *Red Cross*, were to increase the effectiveness of the strike weapon and to reduce the potential for picket line violence by eliminating certain "flashpoints". Applying that rationale to the restrictions set out in section 73.1(6), it would appear that the Legislature views as less threatening to the success of the strike and less likely to contribute to the potential for picket

line violence the use of non-bargaining unit personnel who have some attachment to the premises affected by the strike. That attachment is measured, first, by identifying the place of operations in respect of which the strike is taking place and, second, by determining the ordinary place of work of the replacement workers.

30. Where there is only one “place of operations in respect of which the strike ... is taking place”, the restrictions on the use of managerial and non-managerial/non-bargaining unit personnel who do not refuse to work will be the same: both must “ordinarily work” at the place of operations in respect of which the strike is taking place to be able to perform bargaining unit work there during the strike. Where, however, there is more than one “place of operations in respect of which the strike ... is taking place” at which bargaining unit members ordinarily work, the restrictions on the use of non-managerial/non-bargaining unit personnel and managers will vary: non-managerial/non-bargaining unit personnel will only be able to perform bargaining unit work at the *same* place of operations as the one at which they ordinarily work (section 73.1(6)1); while managers who ordinarily work at a struck place of operations will be permitted to perform bargaining unit work at *any* struck place of operations (section 73.1(6)2). Accordingly, the breadth of meaning given to the phrase “place of operations” may determine, in a given case, the number of non-bargaining unit personnel able to perform bargaining unit work.

31. The statute does not define “place of operations”. What it does define is “place of operations in respect of which the strike or lock out is taking place” as including “any place where employees in the bargaining unit who are on strike or who are locked out would ordinarily perform their work” (section 73.1(1)). However, the purpose of that definition appears to be to distinguish between struck places and non-struck places, rather than between struck places. Accordingly, it is of little assistance in this case.

32. In the absence of a statutory definition, therefore, and consistent with the foregoing rationale, it seems appropriate for the Board to consider the extent to which the proposed places are geographically and operationally distinct. If the goal of determining whether a particular workplace constitutes “another of the employer’s places of operations” is to identify an employee complement prohibited from working or entitled to work at that place, it must first be possible to separate that place from others in the employer’s operation not only in terms of geography but operational activity. While the extent of the physical and operational integration or separation required, and the factors relevant to each, may vary from case to case, critical will be the nature of the employee activity within the physical locations in dispute.

33. On the facts of this case, and having regard to the nature of the Commission’s operations and the geographic locations at which they are carried on, a majority of this panel is of the view that those aspects of Albion Road, the field and the generating stations at which the replacement workers and bargaining unit members ordinarily work, are not sufficiently distinct as to constitute separate “places of operations”.

34. The evidence we heard was of a highly integrated, continuously functioning, hydro-electric system carried on at countless locations within the cities of Ottawa and Vanier, and the Village of Rockcliffe Park. Included among these locations are Albion Road, the thousands of work sites referred to in paragraphs 7 and 8 of this decision, and the generating stations.

35. While geographically diffuse, all of the Commission’s various work sites are operationally linked, not only by means of cables and equipment but, more importantly, by employee activity. Both bargaining unit and non-bargaining unit personnel may be deployed to various work sites in a given day. Depending upon the specific employee’s classification or job title, these sites may include any number of customer homes, transformer stations, substations, customer vaults, tele-

phone polls, manholes, and the generating stations. In respect of all of these sites, and for the employees working at them, Albion Road serves as both a “nerve centre” and a “home base”.

36. Except in the case of the travelling operators assigned to the generating stations, and a few individuals working in the service buildings, all of the employees in respect of whom we heard evidence spend some of their time at Albion Road and some in the field. (Indeed, Messrs. Cavanagh, Edey and Clouthier appear to work in the field with sufficient frequency to qualify as permitted replacement workers even on the union’s theory of the case). The differences in the amount of time spent by the replacement workers and the bargaining unit members at these locations are not sufficient to suggest to us that they are separate places of operations. Nor does the fact that the travelling operator assigned to the generating stations punches in and out at that location and generally remains there for the entire day lead us to conclude that the generating stations are “another of the employer’s places of operations” separate from Albion Road or from any other location at which the replacement workers or bargaining unit members ordinarily work. Just like the travelling operators who actually travel, the individual assigned to the generating stations is supervised from Albion Road and is in regular contact with that location to obtain operational instructions and advice. Together, the generating stations, the other field locations, and Albion Road are part of a comprehensively integrated operating system.

37. The degree of integration of the generating stations into the rest of the Commission’s operations is highlighted by their dependency upon the personnel and expertise dispatched from Albion Road. Without the daily maintenance support from other travelling operators and the additional activity performed on an as-needed basis and during the summer shut-downs, the generating stations could not operate. Much like the unstaffed transformer stations, the generating stations are dependent upon the work of bargaining unit members and others from Albion Road for their safe and continuous operation. The contact between the travelling operator assigned to the generating stations and other Commission personnel is both substantial and essential to the continuous functioning of the generating stations as part of the Commission’s overall hydro-electric network.

38. It is noteworthy as well that the output of the generating stations appears to contribute only a fraction to the Commission’s “bottom line”, and that there is only one individual assigned there. While it may not be necessary to have a substantial employee complement at a given location for it to constitute “another of the employer’s places of operations”, the absence of any supervisory personnel and the presence of only one employee suggests to us an absence of operational distinctiveness and independence.

39. On the basis of all of these factors, we concluded that the locations at which the replacement workers were working during the strike and the places at which they ordinarily work do not constitute separate “places of operations” within the meaning of section 73.1(6)1. On that basis, and for the reasons given at the beginning of this decision, the application was dismissed.

DECISION OF BOARD MEMBER P. V. GRASSO; September 14, 1994

1. With respect to my colleagues, I must dissent from their decision.

2. In this application the union asserts that the employer has contravened subsection 73.1(6) of the *Labour Relations Act*. This subsection limits the use of replacement workers when employees in the particular work site are on a lawful strike. Section 73.1(6) provides as follows:

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1(3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

Subsection 73.1(5) provides as follows:

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
2. The work of an employee in the bargaining unit that is on strike or is locked out.
3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

Subsection 1(3) of the Act provides as follows:

1.- (3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

3. Thus, employers are prevented from using (at a place of operations where a strike is ongoing) employees from another of their places of operations to do the work of employees in the striking unit. The work of striking employees may be performed at the struck location, however, by managerial and non-bargaining unit employees who ordinarily work at the same location as the strikers.

4. In my opinion, Ottawa Hydro has violated section 73.1(6) of the Act by using employees from other work sites to do the work of employees in the particular work sites that are on strike. The composition of the bargaining unit is not the relevant inquiry under section 73.1. Rather, section 73.1 focuses on the "place of operations in respect of which the strike or lock-out is taking place" as well as the place where the replacement worker "ordinarily works". In other words, the relevant question is not who, but where. The employer is not permitted to bring in employees from one place of operations to do the work of employees who are on strike in another place of operations. That this is the legislative intent underlying section 73.1(6) is demonstrated by the following statement by the Honourable Minister of Labour, Bob Mackenzie, made during the debate on Bill 40: (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No.46 at 1849 (6 July 1992).

It is clear that the use of some replacement workers prolongs labour disputes, uses up costly police resources, creates an air of conflict and all too often leaves a legacy of bitterness. *We are therefore proposing to prohibit the performance of work of striking and locked-out employees by everyone except managers and other non-bargaining unit employees working at the same location.*

(emphasis added)

This interpretation has also been accepted by the Board in *The Canadian Red Cross Society*, [1994] OLRB Rep. Jan. 34 at 48-49 which stated:

It is clear that these sections do not purport to ban the performance of the work of striking employees absolutely. For example, in addition to the named exceptions set out in section 73.2, the structure of 73.1 permits the use of certain types of persons either explicitly or by omission. *At the same time, however, it is also apparent that the prohibitions are very comprehensive in scope, particularly in the case of work performed at the strike location.*

(emphasis added)

The Board confirmed that this is the proper approach to be taken in *Labatt's Ontario Breweries, Div. of Labatt Brewing Co.*, [1994] OLRB Rep. June 704 at 12.

5. Turning to the facts of this case, the Hydro-Electric Commission of the City of Ottawa is an electrical utility which operates in Ottawa, Vanier, and Rockcliffe Park. As with any large utility, Ottawa Hydro does not have only one place of operations. It operates a headquarters (at 3025 Albion Road North in Ottawa), where the majority of its employees work, and a number of separate transformer and generating stations. As well, most of the employees in the Works Department work in the field. The generating stations at issue in this case are located some distance away from the headquarters: namely, on Victoria Island in the Ottawa River.

6. On the evidence before us I find that the Albion Road Works, the Victoria Island generating stations and the field works each constitute a separate place of operations.

7. As mentioned, each enumerated work site is a distinct "place of operations in respect of which the strike or lock-out [was] taking place". Each is staffed by bargaining unit employees who were on strike and picketing occurred at all three locations.

8. As the majority has pointed out, the union conceded that six of the eleven employees at issue are managerial or confidential. The five remaining employees ordinarily work at Albion Road. However, during the strike, they acted as replacement workers at both the Victoria Island generating stations and the field. I am therefore of the opinion that they constituted replacement workers in violation of section 73.1(6). For these reasons, I would have granted the union's application.

1321-94-M Practical Nurses Federation of Ontario, Applicant v. 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence, Responding Party

Change in Working Conditions - Interference in Trade Unions - Interim Relief - Remedies - Unfair Labour Practice - New schedule alleged by union to violate statutory freeze and to be motivated by anti-union considerations - Union filing unfair labour practice complaint and seeking interim relief - Balance of harm weighing in favour of union - Employer directed to revoke new scheduling system and to reinstate prior system on interim basis pending disposition of union's unfair labour practice complaint

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *Douglas T. Wray*, *Josephine Gibbs* and *Louise Dubaud* for the applicant; *Andrea F. Raso*, *Sally Hung*, *Gloria Lindsay* and *Tom Kitchen* for the responding employer.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO;
September 7, 1994

I

1. By decision dated July 28, 1994, the majority of the Board (Board Member Ronson dissenting) granted the application for interim relief herein by directing the responding employer "to forthwith revoke the new scheduling system (as reflected in the schedules for July 18-31 and August 1-14, 1994), and to reinstate the scheduling system in effect for Registered Practical Nurses prior to July 18, 1994, on an interim basis pending the disposition of the main application (in Board File No. 1322-94-U), or further direction by the Board". The following are our reasons.

II

2. Subsection 92.1(1) of the *Labour Relations Act* provides that:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

3. As its name suggests, the responding employer ("Vistamere") operates a retirement residence in Oakville. It is managed under a management contract with Extendicare Health Services Inc. Vistamere has a "residential wing" and a "care wing". It appears that the primary difference between the two wings is the amount of personal care provided to the residents; namely, that the occupants of the "care wing" receive more of it. (We note that there was no suggestion in the materials or at the hearing that the *Hospital Labour Disputes Arbitration Act* applies to Vistamere.)

4. On April 21, 1994, the Board certified the applicant as the bargaining agent for employees of Vistamere in the following bargaining unit:

"all employees of 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence employed in a nursing capacity as Registered and Graduate Practical Nurses in the City of Oakville, save and except supervisors and persons above the rank of supervisors".

The parties are currently engaged in negotiating a first collective agreement.

5. By letter dated May 16, 1994, Vistamere provided the applicant with collective bargain-

ing information concerning the terms and conditions of employment of bargaining unit employees. Vistamere also advised the union that:

"The facility is currently experiencing a reduction in occupancy levels in their care wing and as a result we will have to reduce the R.P.N. hours in this area. It is important that we meet to discuss this concern as soon as possible. Please give me a call to arrange a mutually satisfactory time."

6. It appears that this issue was discussed at a subsequent collective bargaining meeting at which Vistamere presented two alternative proposals for reducing Registered Practical Nurses ("RPN") hours. By letter dated May 25, 1994 in that respect, Vistamere wrote to the applicant as follows:

"This letter will confirm the Employer's requirement to reduce staff at Vistamere due to declining occupancy levels and will set out our revised position in this regard, as discussed with you at our meeting in Mississauga on Tuesday May 24th, 1994, as follows:

1. Registered Practical Nurses where employed on the care wing effective August, 1991 when the occupancy level reached eighteen (18) residents and it was no longer practical to meet the needs of the entire facility with one RPN.
2. Due to our current occupancy level in the care wing of fifteen (15) residents and with further reductions anticipated, it is critical that we reduce our staff in the building effective as soon as practically possible.
3. Considering the concerns raised by the Union in our morning meeting and in particular the protection of both full-time and part-time bargaining unit members, the Employer will agree limit [sic] the current layoff to the elimination of the day shift RPN from Monday to Friday. This will result in the following:

RPN's

Current	315.0 hours per week
Reduction	<u>37.5</u> hours per week
Revised hours	277.5 hours per week

This results in an hourly reduction of 11.9% for the RPN's.

HCA's

Current	63.5 hours per week
Reduction	<u>26.0</u> hours per week
Revised hours	37.5 hours per week

This results in an hourly reduction of 40.1% for the HCA's.

4. Proposal A on the schedule I gave you would result in;
 - full-time RPN's continuing to work 10 shifts biweekly
 - no part-time RPN's would be laid off but would work reduced hours with priority given to the most senior employees providing they are available to work the shifts required
 - current practice of allowing employees every other weekend off would continue based on the availability of staff

Proposal B on the schedule I gave you would result in;

- full-time employees continuing to work 10 shifts biweekly
- probationary part-time employees being laid off

- remaining part-time employees working more hours than in proposal A
 - employees required to work three weekends in four in order to accommodate the schedule
5. As discussed this layoff would be temporary and employees will be called back to work when the occupancy level in the care wing is at eighteen (18) residents or greater.
 6. As discussed, this proposal impacts other, non-bargaining unit employees and must be kept confidential until finally resolved.

As set out in our meeting the Employer wishes to work with the Union and it's members to resolve this and any other issues on a mutually satisfactory basis.

I look forward to hearing from you in this regard at your earliest convenience."

(Vistamere conceded that the 11.9% figure in its letter is incorrect. It should be 13.5%.)

7. Vistamere alleged that the union accepted, in principle at least, the proposal which would reduce the hours of part-time RPN *based on seniority*, but which would avoid lay-offs. The union denied that it agreed to anything and points to the counter-proposal it made at a collective bargaining meeting on June 16, 1994, which counter-proposal Vistamere asserted would increase the RPN hours by 15 hours bi-weekly while completely eliminating Health Care Aide's scheduled hours.

8. Vistamere stated that it rejected the union's counter-proposal and informed the union, by letter dated June 28, 1994, that it would implement an overall reduction of 37.5 part-time RPN hours per week, along with the 40% reduction in Health Care Aid hours as follows:

"In line with my telephone call to you yesterday the occupancy in the care wing has now dropped to fourteen (14) residents. It is necessary therefore, based on economic reasons, to reduce the staffing in the facility effective as soon as practically possible.

Consistent with our meeting on June 16th, our approach will be to eliminate the day shift RPN from Monday to Friday resulting in an overall reduction of RPN hours of seventy-five hours biweekly. As you are aware, hours for employees outside of the bargaining unit will be cut with hours in the health care aide classification being reduced by 40 percent.

It is unfortunate that your committee did not provide us with some constructive suggestions with regard to minimizing the impact on employees effected. Notwithstanding this we will consider the seniority of all employees, their preference with regard to shifts, attempt to retain the full-time positions and give all employees the opportunity to work some scheduled shifts.

Management will meet with the employees today and discuss the above. The reduction in hours will be treated as a layoff and employees will be given notice in line with the requirements of the Employment Standards Act.

If you have any questions or concerns with regard to the above please let me know.

9. By letter dated June 27, 1994 to Louise Dutaud, one of the grievors herein, Vistamere advised that:

"Please be advised that the employer is required to reduce staffing as a result of current occupancy levels. This letter is formal notice that your bi-weekly hours will be reduced from 37.5 hours to approximately 22.5 hours effective August 9, 1994. This six week notice of layoff includes the notice requirement under the employment act."

Similar letters, but with different effective dates, were apparently sent to other part-time bargaining unit employees.

10. Vistamere did in fact implement this new schedule.

III

11. The applicant alleged that the two grievors, Louise Dutaud and Josephine Gibbs, were the two most senior bargaining unit employees and that they had been targeted by Vistamere's new RPN scheduling system for "special treatment" because they were known to be the union's chief employee supporters and spokespersons. The applicant alleged that Vistamere's improperly motivated unilateral conduct violates sections 65, 67, 71, 81, 81.2, 82 and 82.1 of the *Labour Relations Act*. The applicant argued that if the interim relief was not granted it would severely "prejudice ... the affected employees and the Applicant will suffer irreparable harm in its efforts to bargain and represent its members."

12. Vistamere argued that the applicant's materials in this application did not disclose an arguable case for interim relief, and that the union was not entitled to the interim relief it sought because it had consented to a reduction of RPN hours. Further, Vistamere argued that the harm the union alleged it would suffer if interim relief was not granted is remote, speculative and does not warrant intervention by the Board. Vistamere argued that there was no indication that the scheduling changes have had any impact on collective bargaining or bargaining unit support for the trade union. Vistamere also argued that this application should be dismissed because of the delay in bringing it. Vistamere argued that the individual harm alleged is largely economic and can be compensated for in the main application, the hearing of which was scheduled to begin on August 10, 1994 and continue day to day Monday through Thursday until it was completed, and does not otherwise justify the interim relief sought. On the other hand, Vistamere asserted that it would suffer inconvenience and incur unrecoverable expenses if the interim relief was granted.

IV

13. As the Board observed in *Loeb Highland*, [1993] OLRB Rep. March 197, section 92.1(1) of the *Labour Relations Act* gives the Board a new broad discretion to intervene in any proceeding or intended proceeding. It has been described as an addition to the Board's remedial arsenal (*Tate Andale Canada Inc.*, Board File No. 3438-92-M, October 13, 1993, unreported [now reported at [1993] OLRB Rep. Oct. 1019]). There is nothing in section 92.1(1) which limits its use or suggests that it should only be used in extraordinary cases. On the other hand, neither does it suggest that interim relief is appropriate or should be granted in every case. While interim relief is not an extraordinary remedy within the context of the present legislation, neither is it there just for the asking. On the contrary, subsection 92.1(1) gives the Board a labour relations tool which is to be wielded carefully, having regard to the circumstances of each case. It is to be used like a scalpel, not as a hammer or other blunt instrument, in cases in which the Board is satisfied that there are good labour relations reasons for intervening in a labour relations dispute pending the litigation of the merits of that dispute.

14. Because section 92.1(1) is labour relations legislation intended to be used as a labour relations device, a civil litigation approach may provide some guidance but should not be rigidly applied by the Board (see *Tate Andale Canada Inc.*, *supra* at paragraph 39). Similarly, when viewed as a whole, the *Labour Relations Act* in this province is unlike labour relations legislation in any other North American jurisdiction. Accordingly, the experience in these other jurisdictions is also of limited assistance.

15. The Board's approach to interim relief applications has been to avoid as much as possible prejudging the merits of the main application (which in the case of an "intended proceeding" may not even be formally before the Board). However, there will inevitably be some connection between the interim application and the main application such that some assessment of at least the apparent merits of the main application must inevitably be made.

16. In the result, a two-pronged "test" has emerged in the Board's interim relief jurisprudence to date. First, assuming the applicant's assertions to be true, is there an arguable breach of the *Labour Relations Act* (or presumably any other legislation with respect to which the Board plays an adjudicative role) for which there is a remedy which the Board is arguably empowered to give? Second, if so, does the balance of *labour relations* harm favour the granting of interim relief?

17. In *Tate Andale Canada Inc.*, *supra*, the Board observed in paragraph 52, that:

... where the employer bears the legal onus of establishing that it has *not* contravened the Act, it is hardly surprising that the union requests that the "pre-discharge" status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of the employees from the workplace was *not* unlawful, there is nothing counter-intuitive about keeping them there until it does so. ...

This comment must be read in the context of the situation before the Board in that case; namely, the discharge during an organizing campaign of employee organizers, and not as a suggestion that the onus in interim proceedings necessarily lies with the party which bears the onus in the main application - which may not even have been brought. There is nothing which absolutely prohibits discharges, lay-offs, scheduling changes, or other management initiatives prior to certification, before a first collective agreement, or between collective agreements. Nor is there anything which requires that a discharged or laid-off employee be reinstated, or that other management initiatives be reversed, on an interim basis, in such circumstances.

18. The two-pronged test developed by the Board suggests that at least the initial onus is on an applicant for an interim relief to satisfy the Board that interim intervention is appropriate. Consequently, an applicant must plead an arguable or *prima facie* case. This is not a particularly onerous hurdle since an applicant should be able to describe its allegations in a manner which suggests that it may have something to complain about. Further, an applicant must establish that interim relief is appropriate; namely, that it will suffer some substantial labour relations harm unless the Board intervenes pending the disposition of the application it has pleaded on its merits. This is not terribly onerous either, since it only requires an applicant to explain why it seeks interim relief and what labour relations harm will occur if it does not obtain the interim relief it seeks. In determining whether interim relief is appropriate, the Board also looks at the responding party's assertion of harm to see whether there are any countervailing labour relations harm which makes interim relief inappropriate. That is, the Board weighs the respective harms and assesses whether interim relief is appropriate.

19. Because of the wide variety of proceedings and circumstances in which interim relief may be sought, a flexible approach to the two-pronged test is indicated, so that the appropriate labour relations result may be achieved in each case.

20. The nature of interim relief proceedings is such that the Board will not normally hear evidence. Consequently, and because of the nature of the two-pronged test applied by the Board in such cases, it is crucial that the parties file complete pleadings and declarations, which declarations should as much as possible be first hand accounts of matters which are relevant to the Board's considerations. The declarations which the parties must file (pursuant to the guidelines provided by

Rules 86 and 89) should not contain any hyperbolic, rhetoric or conclusions for which no factual basis is set out.

V

21. In *Beef Improvement Ontario Incorporated*, [1994] OLRB Rep. April 341 (application for reconsideration dismissed June 3, 1994, unreported), a recent interim relief case involving section 81 of the Act, the Board reviewed the purpose and effect of the statutory freeze provision as follows:

15. Section 81 is a strict liability provision in that an employer or trade union need not be improperly motivated for its actions to be in breach of it (see *Beaver Electronics Ltd.*, [1974] OLRB Rep. March 120, *Kodak Canada Ltd.*, [1977] OLRB Rep. Aug. 517). Commonly referred to as a “freeze” provision, section 81(1) of the *Labour Relations Act* prohibits both an employer and the trade union which represents that employer’s employees from altering anything which affects the employment of those employees after an appropriate notice to bargain has been given, unless its collective bargaining partner consents. The purpose of these provisions is to provide a stable point of departure for collective bargaining, thereby facilitating the collective bargaining process, by maintaining the working conditions and circumstances in place when the freeze is triggered. This serves to provide a fixed, though not necessarily static, basis for collective bargaining and operates to preclude the unilateral alteration of any bargainable aspect of the employment status quo which might give one party an advantage in negotiations.

16. Although the “freeze” label has stuck, it may be somewhat of a misnomer. The words of section 81(1) of the Act might be read to mean that there can be no change in anything which affects employment during the specified period. However, the Board has interpreted this provision as operating to preserve the pattern of employment which exists when it comes into effect, rather than specific terms, conditions or other circumstances of employment. Consequently, both the employer and the trade union continue to be entitled to operate within the parameters of the established pattern of employment. (see, for example, *Simpsons Limited*, [1985] OLRB Rep. April 594, *Mohawk Hospital Services Inc.*, [1993] OLRB Rep. Sept. 873).

17. The Board has taken a flexible, and purposive labour relations approach to the statutory freeze under the *Labour Relations Act*. Further, and as the language of section 81(1) itself suggests, there is nothing wrong or even unusual with an employer and trade union negotiating with respect to matters which are subject to the statutory freeze.

• • •

23. The other harm asserted by the applicant is a collective bargaining harm. In the Board’s view, it is not accurate to say that the applicant is seeking to gain an advantage in collective bargaining through this interim proceeding. On the contrary, the applicant seeks to have the collective bargaining positions of the parties restored to what they were at the time of the transfer from the Crown to OSI and BIO respectively. That is what section 81(1) is all about; namely, providing a period during which there is a fixed and stable point of departure for collective bargaining. The scheme of the *Labour Relations Act* recognizes that a change in the terms, conditions or other circumstances of employment by one party can cause harm to collective bargaining position of the other party to a collective bargaining relationship. This is a significant labour relations harm.

24. The responding parties OSI and BIO submitted that this sort of collective bargaining harm need not be addressed in an interim proceeding and that collective bargaining can proceed, on other issues, pending the disposition of the main application. The Board does not agree. It is true that collective bargaining can take many routes, and that some items can often be bargained before and sometimes without reference to others. However, in the big picture, the starting point for bargaining can have a significant impact on what is given or taken in one area which can in turn affect what is given or taken in other areas. The statutory freeze is just that and it addresses situations which readily lend themselves to interim relief.

We agree. However, this should not be taken to suggest that the interim relief will be appropriate in every “freeze” case.

22. In addition, the Board has held that interim relief is appropriate in circumstances in which it will serve to neutralize the potential impact of an alleged unfair labour practice or preserve the status quo in order to stabilize a labour relations situation pending the disposition of a dispute on its merits (*J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145 at paragraph 13).

VI

23. In the majority’s view, that reasoning was equally applicable to this case.

24. In our view, the delay between June 27-28, 1994 and July 15, 1994, when this application was filed, was not, in the circumstances, untoward. The application was a response to Vistamere’s decision to implement the scheduling changes complained of, which for purposes of this interim application we accept were not agreed to by the union. This “delay” of at most 18 days must be viewed in the context of the previous dealings between the parties. The scheduling issue was raised on May 16, discussed on May 24 (8 days later) and again on June 16 (23 days after the first meeting), followed by Vistamere’s notice to bargaining unit employees on June 27 (11 days later) and to the union on June 28 (12 days later) respectively. Further, in this case there is nothing in the materials or Vistamere’s representations at the hearing which suggested that the employer did anything in reliance on a belief that the applicant was not going to pursue the matter, or that it was otherwise prejudiced by the delay in bringing the application. Finally, although a party which seeks interim relief should move for it expeditiously, the Board does not expect a party to run to it at every turn, but rather that it will first consider its position and properly prepare its application. There may be cases in which a delay of 18 days is fatal, but the majority did not consider this to be such a case.

25. The majority was satisfied that the application for interim relief disclosed an arguable or *prima facie* case; that is, that if the applicant proves what it has alleged, there is a case to be answered.

26. Moving to the balance of harm, the majority did not consider the individual harms asserted to be a basis for granting the interim relief requested. Indeed, individual harm will rarely provide a sufficient basis for interim relief. The Board’s interim relief power is a labour relations tool in a labour relations statute. It is to be applied for labour relations reasons, not personal ones. However, the majority recognized, as the Board did in *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358, that a collective bargaining relationship can be particularly sensitive or fragile in its early stages, especially during negotiations for a first collective agreement, both from the representation/trade union support perspective, and from a collective bargaining perspective.

27. This does not mean that interim relief will be appropriate in every first collective agreement situation. On both representation and collective bargaining issues, the applicant must satisfy the Board that it will suffer a substantial labour relations harm if the interim relief sought is not granted in circumstances where there is no countervailing or offsetting harm which the responding party will suffer if interim relief is granted. In the context of this application (and indeed most interim relief cases) where the responding party is the employer, it must be remembered that the employer retains the right to manage the workplace, except to the extent that it has bargained away that right and subject to the provisions of the *Labour Relations Act* or other legislation. Section 92.1 is not a licence for Board management of the workplace. It is a mechanism available for use, where necessary, to stabilize the labour relations situation pending an adjudication of a labour relations dispute.

28. The *Labour Relations Act* is legislation which interferes with or modifies an employer's right to operate its workplace as it sees fit. More specifically, provisions like section 65, 66, 67, and 71 prohibit an employer from interfering with the formation, selection or administration of a trade union, or from "targeting" employees because they are members or supporters of a trade union, or because they are otherwise exercising a right under the Act. Section 81 is a more direct interference with the employer's right to operate its workplace. During the period to which it applies, it prohibits an employer from altering any term, condition or privilege of employment without the consent of the trade union which represents the employees.

29. In this case, the two grievors were the two most senior bargaining unit employees and also the employee representatives of the applicant trade union. Despite Vistamere's assertion (in its June 28, 1994 letter) that it would consider "the seniority of all employees, their preference with regard to shifts, attempt to retain full-time positions and give all employees the opportunity to work some scheduled shifts", there was nothing before the Board in this case which indicated how these factors were applied either generally or specifically to the two grievors, or at all. In our view, the representation harm likely to be suffered by the applicant in the interim as a result was neither remote nor speculative. It is precisely the kind of harm which strikes at the heart of the protections of the *Labour Relations Act*, particularly in a first collective agreement situation.

30. Further, the scheduling changes implemented by Vistamere constitute a clear alteration of conditions of employment which have been and are the subject of collective bargaining between the parties. That is, these changes have altered the point of departure for collective bargaining. Again, this collective bargaining harm to the applicant in these circumstances is manifest.

31. On the other hand, the harm alleged by Vistamere is that it will be inconvenienced and incur unrecoverable expenses. There is nothing before the Board which indicated that the inconvenience to Vistamere would be substantial and mere inconvenience cannot counter the sort of labour relations harm likely to be suffered by the applicant in this case. Further, there was nothing in the materials before the Board which indicated what the unrecoverable expenses which Vistamere would incur if the interim relief sought was granted might be, or that these expenses would be substantial, particularly since the hearing of the main application was scheduled to begin on August 10, 1994 and continue day to day on Monday through Thursday until it is completed. In the result, the majority was satisfied that the balance of harm favoured the applicant and granted the interim relief sought as aforesaid.

DECISION OF BOARD MEMBER J. A. RONSON; September 7, 1994

1. Because of its behaviour prior to the commencement of this proceeding, the applicant union is not entitled to the extraordinary remedy of interim relief.

2. Labour relations in this Province is not well served if the Board allows the applicant union to behave as it did in this matter. Having been advised of the employer's intention, the union then did nothing for a substantial period of time. It did not tell the employer that it would be bringing this complaint; it did not tell the employer that it would ask for interim relief abrogating the scheduling decisions made by the employer.

3. Instead, the union allowed the employer to crawl out on the limb, and now asks the Board to saw off the limb behind it. I would dismiss the application for interim relief.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0964-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Aberfoyle Steel Incorporated (Respondent)

Unit: "all iron workers and iron workers' apprentices in the employ of Aberfoyle Steel Incorporated in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all iron workers and iron workers' apprentices in the employ of Aberfoyle Steel Incorporated in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3387-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Township of Herschel (Respondent)

Unit: "all employees of The Corporation of the Township of Herschel in the Township of Herschel, save and except Clerk-Treasurer, persons above the rank of Clerk-Treasurer, Chief Building Official, and By-Law Enforcement Officer" (6 employees in unit)

0262-94-R: United Steelworkers of America (Applicant) v. Bannerman Enterprises Inc. (Respondent) v. Objecting Employees (Intervenors)

Unit: "all employees of Bannerman Enterprises Inc. in the Town of Kirkland Lake, save and except managers and persons above the rank of manager" (36 employees in unit)

0371-94-R: United Steelworkers of America (Applicant) v. Kroehler Furniture Group Inc. (Respondent)

Unit: "all employees of Kroehler Furniture Group Inc. in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff" (47 employees in unit) (*Having regard to the agreement of the parties*)

0476-94-R: Local Union 2228 International Brotherhood of Electrical Workers (Applicant) v. Canadian Air Traffic Control Association (Respondent)

Unit: "all employees of the Canadian Air Traffic Control Association in the City of Nepean, save and except Managing Director, persons above the rank of Managing Director and elected officers" (6 employees in unit)

0578-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 629511 Ontario Inc. carrying on business as A-1 Enterprises (Respondent)

Unit: "all construction labourers in the employ of 629511 Ontario Inc. carrying on business as A-1 Enterprises in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 629511 Ontario Inc. carrying on business as A-1 Enterprises in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0609-94-R: Teamsters Local Union 938 (Applicant) v. 684804 Ontario Limited c.o.b. as City Taxi; Peel Taxi Limited, Intercab Incorporated; Mississauga Taxi Inc. and 7-11 Taxi (Respondent)

Unit: "all dependent contractors (including drivers, lessee drivers and broker drivers) employed by 684804 Ontario Limited c.o.b. as City Taxi; Peel Taxi Limited; Intercab Incorporated; Mississauga Taxi Inc. and 7-11 Taxi working in and out of the Regional Municipality of Peel, save and except supervisors, persons above the rank of supervisor, dispatcher, office, clerical and sales staff and multi-plate or multi-car owners of lessees" (153 employees in unit) (*Having regard to the agreement of the parties*)

0712-94-R: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Unions 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309 (Applicant) v. Printing Press Services International Inc. (Respondent)

Unit: "all millwrights and millwright apprentices in the employ of Printing Press Services International Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all millwrights and millwright apprentices in the employ of Printing Press Services International Inc., in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit)

0888-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Tri-Vision Electronics Inc. (Respondent)

Unit: "all employees of Tri-Vision Electronics Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales and marketing staff and office, clerical and accounting staff" (66 employees in unit) (*Having regard to the agreement of the parties*)

0923-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Michael York (Toronto) Limited c.o.b. as Campbellford I.G.A. and York Jug City (Respondent)

Unit: "all employees of Michael York (Toronto) Limited c.o.b. as Campbellford I.G.A. and York Jug City in the town of Campbellford, save and except Assistant Store Manager (I.G.A.), persons above the rank of Assistant Store Manager (I.G.A.), Grocery Manager, Produce Manager, Meat Manager, Head Cashier, full-time meat department employees and store manager (Jug City)," (48 employees in unit)

0961-94-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Basile Interiors Ltd. (Respondent)

Unit: "all painters and painters' apprentices employed by Basile Interiors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices employed by Basile Interiors Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (7 employees in unit)

1060-94-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 219 Church Street in the Municipality of Metropolitan Toronto, at 1503 Clarkson Road in the City of Mississauga, and at or out of 7755 and 7765 Hurontario Street in the City of Brampton, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

1123-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Canadian Corps of Commissionaires (Hamilton) (Respondent)

Unit: "all employees of the Canadian Corps of Commissionaires (Hamilton) employed at Hamilton Airport in the Town of Mount Hope, save and except Detachment Commanders and persons above the rank of Detachment Commander" (10 employees in unit) (*Having regard to the agreement of the parties*)

1125-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Albis Canada Inc. (Respondent)

Unit: “all employees of Albis Canada Inc. in the Town of Pickering save and except supervisors, persons above the rank of supervisor, office and sales staff” (71 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1148-94-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. The Cadillac Fairview Corporation Limited, Toronto-Dominion Centre Operating Division (Respondent)

Unit: “all employees of The Cadillac Fairview Corporation Limited, Toronto-Dominion Centre Operating Division, employed as security personnel at the Toronto-Dominion Centre in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons in bargaining units for which any other trade union held bargaining rights as of June 30, 1994” (36 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1151-94-R: Teamsters Local Union No. 419 (Applicant) v. Davis Distributing Limited (Respondent) v. Chandrabali Mussai and Michelle McCready, Group of Employees (Objectors)

Unit: “all employees of Davis Distributing Limited in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (89 employees in unit) (*Having regard to the agreement of the parties*)

1242-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hanley Foods Inc. o/a Loeb Walker Place (Respondent)

Unit: “all employees of Hanley Foods Inc. o/a Loeb Walker Place in the City of Burlington, save and except the owner, the co-owner, Store Manager, Assistant Store Manager, Office Manager, Grocery Manager, Produce Manager and persons for whom any trade union held bargaining rights as of July 8, 1994” (195 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1244-94-R: Service Employees International Union (Applicant) v. Ian Martin Limited (Respondent)

Unit: “all employees of Ian Martin Limited at Trenton Air Base in the Township of Sidney performing cleaning work, save and except supervisors and persons above the rank of supervisor” (21 employees in unit) (*Having regard to the agreement of the parties*)

1273-94-R: Record Mechanical Employees Association (Applicant) v. Kitchener-Waterloo Record (A Division of Southam Inc.) (Respondent)

Unit: “all employees of Kitchener-Waterloo Record (A Division of Southam Inc.) in its Circulation Department in the City of Kitchener, save and except supervisors and persons above the rank of supervisor” (31 employees in unit) (*Having regard to the agreement of the parties*)

1274-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bread and Roses Credit Union Limited (Respondent)

Unit: “all employees of Bread and Roses Credit Union Limited in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

1290-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lear Seating Canada Ltd. (Respondent)

Unit: “all employees of Lear Seating Canada Ltd. in the City of St. Thomas, save and except supervisors, those above the rank of supervisor, quality engineers, office, clerical and sales staff” (206 employees in unit) (*Having regard to the agreement of the parties*)

1307-94-R: Labourers International Union of North America, Local 183 (Applicant) v. Adelaide Maintenance Limited (Respondent)

Unit: “all employees of Adelaide Maintenance Limited engaged in janitorial services at 2180, 2190 and 2200 Yonge Street in the City of Toronto, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff and students employed during the school vacation period” (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1308-94-R: United Steelworkers of America (Applicant) v. 979055 Ontario Limited (Respondent)

Unit: “all employees of 979055 Ontario Limited in the Regional Municipality of Sudbury, save and except forepersons and persons above the rank of foreperson” (21 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1311-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Bird Foods Inc. c.o.b. as Havelock I.G.A. (Respondent)

Unit: “all employees of Bird Foods Inc. c.o.b. as Havelock I.G.A. in the Town of Havelock, save and except Store Manager, persons above the rank of Store Manager, Meat Manager, Grocery Manager and Head Cashier” (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1341-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Crystal Maintenance Contractors Limited (Respondent)

Unit: “all employees of Crystal Maintenance Contractors Limited engaged in cleaning and maintenance at the Ministry of Transport, 2680 Keele Street and 1201 Wilson Avenue, Downsview Complex in the Municipality of Metropolitan Toronto, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff” (38 employees in unit) (*Having regard to the agreement of the parties*)

1342-94-R: Teamsters Local Union No. 419 (Applicant) v. Olympic Wholesale Co. Ltd. (Respondent)

Unit: “all employees of Olympic Wholesale Co. Ltd. in the Town of Pickering, save and except supervisors, persons above the rank of supervisor, office and sales staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

1343-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 (Applicant) v. Greenline Resins Inc. (Respondent)

Unit: “all employees of Greenline Resins Inc. in the City of Woodstock, save and except supervisors, persons above the rank of supervisor and office and sales staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

1346-94-R: Laundry & Linen Drivers and Industrial Workers Local 847 affiliated with the International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America (Applicant) v. Model Uniform Rental Services Ltd. (Respondent)

Unit: “all employees of Model Uniform Rental Services Ltd. at 326 Braneida Lane in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons in bargaining units for which any trade union held bargaining rights as of July 19, 1994 and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

1362-94-R: Ontario Nurses’ Association (Applicant) v. Fulford Home (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by Fulford Home in the City of Brockville, save and except supervisor and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1367-94-R: Teamsters Local Union No. 419 (Applicant) v. Diplomat Coffee System, a division of Versa Services Limited (Respondent)

Unit: “all employees of Diplomat Coffee System, a division of Versa Services Limited, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff” (14 employees in unit) (*Having regard to the agreement of the parties*)

1390-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 853807 Ontario Limited c.o.b. as LOEB McArthur (Respondent)

Unit: “all employees of 853807 Ontario Limited c.o.b. as LOEB McArthur in the City of Ottawa, save and except Co-owner and persons above the rank of Co-owner, Service Manager, Office Manager, Grocery Manager, Meat Manager and Produce Manager” (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1409-94-R: International Brotherhood of Teamsters (Applicant) v. CAA Mid-Western Ontario and CAA Travel Agency (Mid-Western Ontario) Ltd. (Respondent)

Unit: “all employees of CAA Mid-Western Ontario and CAA Travel Agency (Mid-Western Ontario) Ltd. in the Counties of Wellington, Oxford and Middlesex and the Regional Municipality of Waterloo, save and except Managers, Supervisors and Co-ordinators, persons above the rank of Manager, Supervisor and Co-ordinator, Executive Assistant, Assistant to the Director of Operations, Assistant to the Controller, Human Resources Assistant, Management Information Systems Analysts, maintenance person and groundskeeper” (150 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1421-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Letwin Bros. Limited o/a Quigley Contracting (Respondent)

Unit: “all employees in the employ of Letwin Bros. Limited o/a Quigley Contracting engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand excluding the industrial, commercial and institutional sector, save and except non-working foreperson and persons above the rank of non-working foreperson,” (3 employees in unit)

1427-94-R: United Food and Commercial Workers International Union (Applicant) v. P.E.M.M. Building Materials Ltd. c.o.b. as Beaver Lumber (Respondent)

Unit: “all employees of P.E.M.M. Building Materials Ltd. c.o.b. as Beaver Lumber in the Regional Municipality of Sudbury, save and except Assistant Managers, persons above the rank of Assistant Manager, Floor Managers, Yard Foremen, Head Cashier, office and clerical staff and outside sales staff” (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1430-94-R: United Steelworkers of America (Applicant) v. 697239 Ontario Ltd., c.o.b. as Quality Hotel by Journey’s End (Respondent)

Unit: “all employees of 697239 Ontario Ltd., c.o.b. as Quality Hotel by Journey’s End at 55 Catharine Street South, in the City of Hamilton, save and except Assistant Manager, persons above the rank of Assistant Manager, Maintenance Supervisor, Management Trainee and office secretary/salesperson” (18 employees in unit) (*Having regard to the agreement of the parties*)

1431-94-R: IWA - Canada (Applicant) v. Curtis Products Corp. (Respondent)

Unit: “All employees of Curtis Products Corp. at its Plant in the Township of East Gwillimbury, save and except supervisors, persons above the rank of supervisor and office staff” (17 employees in unit) (*Having regard to the agreement of the parties*)

1449-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Custom Racks Limited (Respondent)

Unit: “all employees of Custom Racks Limited in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (45 employees in unit) (*Having regard to the agreement of the parties*)

1452-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Marchant Property Management Ltd. (Respondent)

Unit: “all employees of Marchant Property Management Ltd., engaged in cleaning and maintenance at 21 Markbrook Lane, Etobicoke, including Resident Superintendent, save and except Site Administrator and persons above the rank of Site Administrator, office and clerical staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

1453-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Tor-Mar Masonry Inc. (Respondent)

Unit: “all bricklayers, bricklayers apprentices and construction labourers in the employ of Tor-Mar Masonry Inc. in all sectors of the construction industry, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the County of Simcoe and the District Municipality of Muskoka excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman,” (9 employees in unit)

1454-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. at 2075 Kennedy Road, Scarborough, save and except the resident foreperson and persons above the rank of resident foreperson” (5 employees in unit) (*Having regard to the agreement of the parties*)

1470-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Niagara Peninsula Construction Concrete and/or Niagara Peninsula Excavating (Respondents)

Unit: “all construction labourers in the employ of Niagara Peninsula Excavating in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1480-94-R: Labourers’ International Union of North America Local 837 (Applicant) v. Ogden Allied Services Inc. (Respondent)

Unit: “all employees of Ogden Allied Services Inc., employed as janitorial staff at Eaton’s Hamilton Eaton Centre, 25 York Blvd., Hamilton, save and except forepersons and persons above the rank of foreperson” (8 employees in unit) (*Having regard to the agreement of the parties*)

1481-94-R: Labourers’ International Union of North America Local 837 (Applicant) v. Ogden Allied Services Inc. (Respondent)

Unit: “all employees of Ogden Allied Services Inc., employed as janitorial staff at Eaton’s Burlington Mall, 777 Guelph Line, Burlington, save and except forepersons and persons above the rank of foreperson” (4 employees in unit) (*Having regard to the agreement of the parties*)

1482-94-R: Labourers International Union of North America Local 837 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards of Group 4 C.P.S. Limited at Hamilton Airport, Mount Hope, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

1484-94-R: The Central of Independent Unions of the Automobile Industry of Ontario (Applicant) v. 147013 Canada Inc. c.o.b. as Jet Away Airport Parking (Respondent)

Unit: “all employees of 147013 Canada Inc. c.o.b.as Jet Away Airport Parking in the City of Mississauga and at 200 Carlingview Drive in the Municipality of Metropolitan Toronto, save and except supervisors, persons

above the rank of supervisor, office and accounting staff" (57 employees in unit) (*Having regard to the agreement of the parties*)

1485-94-R: United Food & Commercial Workers, Local 206 chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O. (Applicant) v. Bruno's Fine Foods (Etobicoke) Ltd. (Respondent)

Unit: "all employees of Bruno's Fine Foods (Etobicoke) Ltd., located at 4242 Dundas Street West, Etobicoke, save and except Department Managers, persons above the rank of Department Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

1498-94-R: Canadian Union of Public Employees (Applicant) v. The Board of Management of The Guild (Respondent)

Unit: "all employees of The Board of Management of The Guild, at the Guild Inn, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons in bargaining units for which any trade union held bargaining rights as of July 27, 1994" (48 employees in unit) (*Having regard to the agreement of the parties*)

1525-94-R: United Steelworkers of America (Applicant) v. Sears Canada Inc. (Respondent)

Unit: "all employees of Sears Canada Inc. employed at its Parts and Service Centre, in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (50 employees in unit) (*Having regard to the agreement of the parties*)

1526-94-R: Canadian Security Union (Applicant) v. 547573 Ontario Limited operating as Norpro Company (Respondent)

Unit: "all Security Officers in the employ of 547573 Ontario Limited operating as Norpro Company at Cameco Corp. (Eldorado Road) in the Town of Blind River, save and except supervisors and persons above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

1552-94-R: Labourers' International Union of North America Local 837 (Applicant) v. Ogden Allied Services Inc. (Respondent)

Unit: "all employees of Ogden Allied Services Inc. employed as janitorial staff at Eaton's Lime Ridge Mall, 999 Upper Wentworth Street, Hamilton, save and except forepersons and persons above the rank of foreperson" (5 employees in unit) (*Having regard to the agreement of the parties*)

1567-94-R: Association of Allied Health Professionals: Ontario (Applicant) v. Peel and Halton Community Access Services Inc. (Respondent)

Unit: "all employees of Peel and Halton Community Access Services Inc., in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

1582-94-R: Graphic Communications International Union, Local 500M (Applicant) v. Web Offset Publications Limited (Respondent)

Unit: "all employees of Web Offset Publications Limited in the Regional Municipality of Durham, save and except non-working foremen, persons above the rank of non-working foremen, office, clerical, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (147 employees in unit)

1588-94-R: International Union of Bricklayers and Allied Craftsmen, Local 7- Canada (Applicant) v. Nova Ceramic (Respondent)

Unit: "all marble masons, tilelayers and terrazzo workers and their apprentices in the employ of Nova Ceramic in the industrial, commercial and institutional sector of the construction industry in the Province of

Ontario, and all marble masons, tilayers and terrazzo workers and their apprentices in the employ of Nova Ceramic in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1589-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Commco Construction Inc. (Respondent)

Unit: "all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers or fireproofing applicators in the employ of Commco Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers or fireproofing applicators in the employ of Commco Construction Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Clarity Note*)

1603-94-R: Public Service Alliance of Canada (Applicant) v. Weeneebayko Health Ahtuskaywin (Respondent)

Unit: "all employees employed in maintenance for Weeneebayko Health Ahtuskaywin at the Moose Factory General Hospital in the District of Cochrane North, save and except Manager, persons above the rank of Manager and persons in bargaining units for which any trade union held bargaining rights as of August 5, 1994" (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1606-94-R: Teamsters Local Union 938 (Applicant) v. VytalBase T-R, A Division of Bramble Canada Inc. (Respondent)

Unit: "all employees of VytalBase T-R, A Division of Bramble Canada Inc., at 5286 Timberlea Boulevard, Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

1615-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. The Wells Gordon Limited c.o.b. as The Briton House Retirement Centre (Respondent)

Unit: "all employees of The Wells Gordon Limited c.o.b. as The Briton House Retirement Centre at its 700 Mount Pleasant Road location in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, family consultants, temporary staff and sub-contracting agency staff" (59 employees in unit)

1617-94-R: Canadian Union of Public Employees (Applicant) v. Wagg's Linen Supply Ltd. (Respondent)

Unit: "all employees of Wagg's Linen Supply Ltd. in the City of Orillia, save and except Assistant Manager, persons above the rank of Assistant Manager, Route Drivers, office and sales staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

1624-94-R: United Steelworkers of America (Applicant) v. Marks and Spencer Canada Inc. (Respondent)

Unit: "all employees of Marks and Spencer Canada Inc. located at 218 Yonge Street in Metropolitan Toronto, save and except Assistant Manager and persons above the rank of Assistant Manager" (32 employees in unit)

1625-94-R: Ontario Nurses' Association (Applicant) v. Marian Villa - St. Joseph's Health Centre, London, Ontario (Respondent)

Unit #1: “all lay registered and graduate nurses employed in a nursing capacity at Marian Villa - St. Joseph’s Health Centre, London, Ontario in the City of London, save and except Nursing Manager, persons above the rank of Nursing Manager, Nurse in Charge Central Supply, Employee Health Nurse, and Nurses regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all lay registered and graduate nurses employed in a nursing capacity for not more than 24 hours per week at Marian Villa - St. Joseph’s Health Centre, London, Ontario in the City of London, save and except Nursing Manager, persons above the rank of Nursing Manager, Nurse in Charge Central Supply and Employee Health Nurse” (6 employees in unit) (*Having regard to the agreement of the parties*)

1634-94-R: Canadian Union of Public Employees (Applicant) v. Ecuhome Corporation (Respondent)

Unit: “all employees of Ecuhome Corporation in the Municipality of Metropolitan Toronto, save and except Property Managers and Regional Co-ordinators and persons above the ranks of Property Manager and Regional Co-ordinator” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1638-94-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph’s General Hospital of North Bay Inc. (Respondent)

Unit: “all paramedical and technical employees of the St. Joseph’s General Hospital of North Bay Inc., in the City of North Bay, save and except Assistant Technical Directors and persons above the rank of Assistant Technical Director” (47 employees in unit) (*Having regard to the agreement of the parties*)

1640-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: “all employees of Zellers Inc. at its store located at 1880 Eglinton Avenue East in the Municipality of Metropolitan Toronto, save and except supervisors/group merchandisers, persons above the rank of supervisor/group merchandiser, loss prevention officers, personnel clerks and students employed in a co-operative work program” (92 employees in unit) (*Having regard to the agreement of the parties*)

1652-94-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Impact Building Maintenance Services Limited (Respondent)

Unit: “all employees of Impact Building Maintenance Services Limited, employed at 655 Bay Street, in the City of Toronto, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*)

1655-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. First Maintenance Services Ltd. (Respondent)

Unit: “all employees of First Maintenance Services Ltd. engaged in cleaning and maintenance at the Crown Life Building located at 175 Bloor Street East in the Municipality of Metropolitan Toronto, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

1658-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. UAP Inc. (Respondent)

Unit #1: “all employees of UAP Inc. at its store number 076 located at 420 McArthur Avenue in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, head counter clerk, office and sales staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of UAP Inc. at its store number 072 located at 711 Belfast Road in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

1669-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Hanson Capital Corporation c.o.b. as Cramco Inc. (Respondent)

Unit: "all employees of Hanson Capital Corporation c.o.b. as Cramco Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (11 employees in unit)

1726-94-R: Ontario Public Service Employees Union (Applicant) v. Beaver Foods Limited (Respondent)

Unit: "all employees of Beaver Foods Limited engaged in Food Services at Huron College Campus in the City of London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

4022-93-R: Ontario Public Service Employees Union (Applicant) v. The Canadian Red Cross Society (Respondent) v. The Canadian Red Cross Blood Transfusion Service Employees Association (Intervener)

Unit: "all non-professional employees (support staff) of the Canadian Red Cross Society working at or out of the Toronto Blood Transfusion Centre, the Hamilton Blood Transfusion Centre, the Ottawa Blood Transfusion Centre and the London Blood Transfusion Centre, together with all employees hired to work in or out of specific locations outside the boundaries of the Toronto, London, Hamilton or Ottawa Blood Transfusion Centres, employed as Clinic Assistants, Clerical Staff, Transport Staff, Laboratory Helpers and Utility persons, save and except Transport Supervisors, Assistant Transport Supervisors, Supervisors of Administrative Services, and persons employed above these ranks; all as described in the Collective Agreement between the Canadian Red Cross Society Blood Transfusion Service and the Canadian Red Cross Blood Transfusion Service Employees Association dated October 1, 1992, Appendix A to the Agreement and the Letter of Understanding dated July 1993 and persons for whom any trade union held bargaining rights as of February 18, 1994," (12 employees in unit)

Number of names of persons on revised voters' list	361
Number of persons who cast ballots	285
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	181
Number of ballots marked in favour of intervener	104

1187-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Procor Limited (Respondent) v. International Brotherhood of Boilermakers, Local 75 (Intervener)

Unit: "all employees employed in Procor Limited's fabricating plant located in Oakville, Ontario, save and except foremen, persons above the rank of foreman, office staff and security guards" (232 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	249
Number of persons who cast ballots	225
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	225
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	152
Number of ballots marked in favour of intervener	71

1216-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. QUNO Corporation (Respondent) v. International Union, United Plant Guard Workers of America, Local 1971 (Intervener)

Unit: "all security guards employed by QUNO Corporation at its paper mill in Thorold, save and except supervisors and those above the rank of supervisor" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	1

Applications for Certification Dismissed Without Vote

1506-94-R: Canadian Union of Professional Security-Guards (Applicant) v. Hamilton-Wentworth Protection Services (1991) Inc. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

4092-93-R: Education Support Staff Association (Applicant) v. Ottawa Board of Education (Respondent) v. Canadian Union of Public Employees and its Local 1400 (Intervener)

Unit: "all office, clerical and technical employees as defined in Article 1, save and except, persons employed in positions set out in Schedule "B" attached; students employed during their summer vacation periods or on work experience programmes; persons employed on a casual basis for less than 30 continuous working days" (479 employees in unit)

Applications for Certification Withdrawn

0357-94-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Toronto Dominion Bank (Respondent)

1233-94-R: Canadian Union of Public Employees (Applicant) v. Scarborough Mobile Crisis Program (Respondent)

1295-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Iron Workers District Council of Ontario (Applicant) v. Master Millwrights Incorporated (Respondent)

1370-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Accucaps Industries Limited (Respondent) v. Group of Employees (Objectors)

1382-94-R: United Steelworkers of America (Applicant) v. Dominion Castings Limited (Respondent)

1443-94-R: Canadian Union of Public Employees (Applicant) v. Melanie's Place (Kerry's Place Group Home) (Respondent)

1464-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Renovation L.C.E. Inc. (Respondent)

1496-94-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Kitchener-Waterloo Record, A Division of Southam Inc. (Respondent)

1714-94-R: The Canadian Union of Public Employees - Local 1281 (Applicant) v. Radio Gryphon (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

0208-94-R: Windsor Newspaper Guild, Local 239, The Newspaper Guild (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent) (*Granted*)

0506-94-R: Service Employees International Union, Local 204 (Applicant) v. Commemorative Services of Ontario (Respondent) (*Granted*)

0767-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Modern Building Cleaning Inc. (Respondent) (*Withdrawn*)

1093-94-R: Communication, Energy and Paperworkers Union, Local 975 (Applicant) v. The Consumers' Gas Company Ltd. (Respondent) (*Granted*)

1497-94-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Kitchener-Waterloo Record, a Division of Southam Inc. (Respondent) (*Withdrawn*)

1626-94-R: Ontario Nurses' Association (Applicant) v. Marian Villa - St. Joseph's Health Centre, London, Ontario (Respondent) (*Withdrawn*)

FIRST AGREEMENT - DIRECTION

1532-94-FC: Independent Paperworkers of Canada (Applicant) v. The Beaverwood Fibre Company Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2017-93-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Duffy Mechanical Contractors Limited, DuraSystems Barriers Inc. (Respondents) (*Granted*)

3345-93-R: Labourers' International Union of North America, Ontario Provincial Council and , Labourers' International Union of North America, Local 247 (Applicants) v. Eastern Concrete Drilling and Sawcutting Ltd. and Eastern Concrete Drilling, a division of 862851 Ontario Limited (Respondents) (*Withdrawn*)

3824-93-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Baur Ceramics Ltd., 996830 Ontario Inc. (Respondents) (*Granted*)

3960-93-R: Christian Labour Association of Canada (Applicant) v. I.O.O.F. Senior Citizen Homes Inc., Odd Fellow and Rebekah Home for the Aged, I.O.O.F. Heritage Place Supportive Housing Complex (Respondents) (*Withdrawn*)

4377-93-R: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Peter Novo Carpenters Ltd. (Respondent) (*Granted*)

0010-94-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 20 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. N.R.J.M. General Contractors Limited, 1000148 Ontario Inc. (Respondents) (*Withdrawn*)

0344-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Hongkong Bank of Canada, Imperial Parking Limited, 1012689 Ontario Limited and 1063450 Ontario Limited (Respondents) (*Withdrawn*)

0519-94-R: Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. J.A. Macdonald (London) Limited and Ontario Panelization Ltd. (Respondents) (*Endorsed Settlement*)

0720-94-R: Ontario Pipe Trades Council, of the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada (Ontario Pipe Trades Council) (Applicant) v. Airdrie Mechanical and Sheet Metal Contractors Limited, and Thornber & Brown Mechanical Contractors Limited, and Tom Thornber (Respondents) (*Terminated*)

0847-94-R: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Abel Metal Limited, Vision Almet Limited (Respondents) (*Withdrawn*)

0939-94-R: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Tara Heating & Air Conditioning Limited, Tara Mechanical Services Inc., Tara Mechanical Services Inc. c.o.b. as Tara Comfort Systems, 1082427 Ontario Ltd., Tony Mammone c.o.b. as Everest Heating and Air Conditioning, Emcon Mechanical Contractors Inc., Lanark Air Systems Inc. and Enomma Holdings Inc. (Respondents) (*Withdrawn*)

1142-94-R: Ontario Public Service Employees Union (Applicant) v. Hotel-Dieu Grace Hospital, Hotel-Dieu Grace Hospital (Respondents) (*Withdrawn*)

1165-94-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Kustom Insulation Ltd., Henry Schumann (Respondents) (*Endorsed Settlement*)

1577-94-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Applicant) v. 947465 Ontario Ltd., c.o.b. as Checker Limousine and Airport Service, G. Hanlon Holdings Inc., G.J. Hanlon and J. Orendorff (Respondents) (*Endorsed Settlement*)

SALE OF A BUSINESS

3345-93-R: Labourers' International Union of North America, Ontario Provincial Council and Labourers' International Union of North America, Local 247 (Applicants) v. Eastern Concrete Drilling and Sawcutting Ltd. and Eastern Concrete Drilling, a division of 862851 Ontario Limited (Respondents) (*Withdrawn*)

3824-93-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Baur Ceramics Ltd., 996830 Ontario Inc. (Respondents) (*Granted*)

4377-93-R: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Peter Novo Carpenters Ltd. (Respondent) (*Granted*)

0010-94-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 20 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. N.R.J.M. General Contractors Limited, 1000148 Ontario Inc. (Respondents) (*Withdrawn*)

0062-94-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital, Brantford and The Brantford General Hospital (Respondents) (*Granted*)

0344-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Hongkong Bank of Canada, Imperial Parking Limited, 1012689 Ontario Limited and 1063450 Ontario Limited (Respondents) (*Withdrawn*)

0519-94-R: Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. J.A. Macdonald (London) Limited and Ontario Panelization Ltd. (Respondents) (*Endorsed Settlement*)

0568-94-R: United Steelworkers of America (Applicant) v. Northern Communication Services Inc. (Respondent) v. Service Employees Union, Local 478 (Intervener) (*Dismissed*)

0720-94-R: Ontario Pipe Trades Council, of the United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada (Ontario Pipe Trades Council) (Applicant) v. Airdrie Mechanical and Sheet Metal Contractors Limited, and Thornber & Brown Mechanical Contractors Limited, and Tom Thornber (Respondents) (*Terminated*)

0847-94-R: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Abel Metal Limited, Vision Almet Limited (Respondents) (*Withdrawn*)

0939-94-R: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Tara Heating & Air Conditioning Limited, Tara Mechanical Services Inc., Tara Mechanical Services Inc. c.o.b. as Tara Comfort Systems, 1082427 Ontario Ltd., Tony Mammone c.o.b. as Everest Heating and Air Conditioning, Emcon Mechanical Contractors Inc., Lanark Air Systems Inc. and Enomma Holdings Inc. (Respondents) (*Withdrawn*)

1165-94-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Kustom Insulation Ltd., Henry Schumann (Respondents) (*Endorsed Settlement*)

1544-94-R: Eva Aceti (Applicant) v. Office and Professional Employees International Union, Local 343 and United Steelworkers of America (Respondents) v. International Union of Operating Engineers, Local 793 and Patricia Bonell (Intervener) (*Withdrawn*)

1577-94-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Applicant) v. 947465 Ontario Ltd., c.o.b. as Checker Limousine and Airport Service, G. Hanlon Holdings Inc., G.J. Hanlon and J. Orendorff (Respondents) (*Endorsed Settlement*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

1090-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Canadian Food and Allied Workers Union Local 1994 (Respondent) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

4088-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Imperial Parking Limited, 1012689 Ontario Limited and 1063450 Ontario Limited (Respondents) (*Withdrawn*)

1006-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Modern Building Cleaning Inc. and Dofasco Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0807-94-R: Shawn Evans on his own behalf and on behalf of a group of employees of 729084 Ontario Limited c.o.b. as Premiere Cable Construction (Applicant) v. Labourers' International Union of North America, Ontario District Council on its own behalf and on behalf of all other affiliated bargaining agents of The Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. 729084 Ontario Limited c.o.b. as Premiere Cable Construction (Intervener)

Unit: "all employees covered by the classifications set out in Schedule A attached hereto, while working in and or out of Local 527 of the Labourers' International Union of North America territorial jurisdiction, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Terminated*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of spoiled ballots	1

Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

0834-94-R: Primrose G. Short (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, 1688 (Respondent)

Unit: "all its Full-Time employees at its Pharma Plus Drugmart Store in Orangeville, Ontario, save and except Store Manager and Assistant Store Manager, persons above the rank of Assistant Store Manager, pharmacists, intern pharmacists and apprentice pharmacists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	8

0835-94-R: Claudette A. Williams (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, 1688 (Respondent)

Unit: "all its Part-Time employees at its Store in Orangeville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except pharmacists, intern pharmacists and apprentice pharmacists" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

1088-94-R: Brad Velema (Applicant) v. The Graphic Communications International Union Local 500M, Toronto (Respondent) (*Dismissed*)

1213-94-R: T. Douglas Pratt (Applicant) v. Communication, Energy and Paper Workers Union (Local 63-0) (Respondent) v. Crain-Drummond Inc. (Intervener) (*Withdrawn*)

1238-94-R: Karen DeNoble - on behalf of the Staff at The Purple Rooster (Applicant) v. Hotel and Restaurant Employees and Bartenders' Union, Local 604 (Respondent) v. The Purple Rooster Inc. (Intervenor) (*Granted*)

1318-94-R: Don Ellis (Applicant) v. Teamsters Local Union No. 879 (Respondent) v. Jaddco Anderson Ltd. (Intervener) (*Granted*)

1356-94-R: Pamela Blais (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Respondent) v. Katalin Lanczi Pharmacy Ltd. c.o.b. Shoppers Drug Mart (Intervener) (*Dismissed*)

1415-94-R: Debbie Carroll, Pat Dinning, Doreen Ivey, Deanne Osborne, Karen Swing, Kim Waite, & Judy Weller (Applicant) v. The Ontario Public Service Employees Union and its Local 221 (Office Employees) (Respondent) v. The Norfolk Board of Education (Intervener)

Unit: "all office employees of The Norfolk Board of Education" (37 employees in unit) (*Granted*)

1429-94-R: William Bradford (Applicant) v. United Food and Commercial Workers' International Union, AFL, CIO, CLC, Local 1000A (Respondent) v. Bavarian Meat Products Limited (Intervener)

Unit: “all employees of Bavarian Meat Products Limited in the City of North Bay, Ontario, save and except Forepersons, persons above the rank of Foreperson, Head Cashier, office and clerical employees and outside salespersons” (20 employees in unit) (*Dismissed*)

1434-94-R: Ian Thompson (Applicant) v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of Canada and the United States, Local Union No. B-173 (Respondent) v. The Hamilton Entertainment and Convention Facilities Inc. (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

0708-94-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 715152 Ontario Inc. c.o.b. Valley Transportation, Deep River (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1776-94-U: Autotote Canada Inc. and Autotote Systems, Inc. (Applicant) v. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local 3, Ken. G. Rose, James L. O'Hara, Howard Cohen, Vincent Lue Pann (Respondent) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

1016-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 112 (Applicant) v. Toromont, a division of Toromont Industries Ltd. (Respondent) (*Dismissed*)

1777-94-U: Labourers' International Union of North America, Local 1059 (Applicant) v. City Centre Management Inc. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3216-91-U: Giancarlo (John) Cesaroni (Applicant) v. Sean O'Ryan and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Respondent) (*Dismissed*)

1694-93-U: Janice Lyn Tomkins (Applicant) v. The Hamilton Street Railway Co. (H.S.R.) - Dept. of Transportation for the Regional Municipality of Hamilton-Wentworth (Respondent) (*Dismissed*)

2355-93-U: Ronald Galloway (Applicant) v. United Steelworkers of America Local 4054, Guelph, Ontario (Respondent) v. ARMTEC - A Division of Jannock Steel Fabricating Co. (Intervener) (*Dismissed*)

3161-93-U: Roy K. Windsor (Applicant) v. United Food and Commercial Workers International Union and Coca-Cola Bottling Ltd. (Respondent) (*Dismissed*)

3185-93-U: Robert Ross (Applicant) v. National Automobile Aerospace and Agricultural Implement Workers of Canada (CAW-Canada) (Respondent) v. National Auto Radiator Manufacturing Company Limited (Intervener) (*Dismissed*)

3437-93-U: Laurentian University Staff Association (Applicant) v. Laurentian University and B. Rayakovich (Respondent) (*Withdrawn*)

3549-93-U: Ontario Public Service Employees Union and its Local 452 (Applicant) v. Hotel Dieu Hospital, Kingston (Respondent) (*Withdrawn*)

3819-93-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. TRS Foods (1993) Ltd. (Respondent) (*Withdrawn*)

4287-93-U: Teamsters Local Union 938 (Applicant) v. Northern Allied Supply Company Limited (Respondent) (*Withdrawn*)

4347-93-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Toronto-Dominion Bank ("the Bank") (Respondent) (*Withdrawn*)

4478-93-U: Amalgamated Clothing and Textile Workers Union (Applicant) v. Royal Shirt Company Ltd. (Respondent) (*Withdrawn*)

0060-94-U: William A. Curtis (Applicant) v. Communications, Energy and Paperworkers Union of Canada (Respondent) (*Dismissed*)

0174-94-U: Communications, Energy and Paperworkers Union of Canada and Communications, Energy and Paperworkers Union of Canada, CLC Local 333-08 (Applicant) v. Harbour Channel Housing Co-operative Inc. (Respondent) (*Withdrawn*)

0230-94-U: Bakery, Confectionery, and Tobacco Workers International Union Local 426 (Applicant) v. Nabisco Brands Canada Ltd. (Respondent) (*Withdrawn*)

0296-94-U: Sharon Williams (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Extendicare/North York (Intervener) (*Withdrawn*)

0412-94-U; 0718-94-U: George Lee (Applicant) v. Local 75, Union Representative Cledwyn Longe (Respondent) (*Dismissed*)

0542-94-U: Labourers Employer Bargaining Agency and Concrete Floor Contractors Association of Ontario (Applicants) v. Labourers' International Union of North America, Local 1059 and Turner Murray Contractors Inc. (Respondents) v. The Formwork Council of Ontario (Intervener) (*Withdrawn*)

0546-94-U: Canadian Union of Public Employees, Local 424 'the Union' (Applicant) v. Stratford General Hospital 'the Employer' (Respondent) (*Withdrawn*)

0549-94-U: Labourers' International Union of North America, Local 837 (Applicant) v. Dofasco Inc. and Modern Building Cleaning Inc. (Respondents) (*Withdrawn*)

0620-94-U: The Operational Managers of the Guelph Correctional Centre (Applicant) v. Her Majesty The Queen in the Right of Ontario, as represented by the Minister of the Solicitor General and Correctional Services (Respondent) v. Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) (Intervener) (*Withdrawn*)

0635-94-U: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Limited (Respondent) (*Granted*)

0707-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent) (*Withdrawn*)

0786-94-U: Firoz Ramji (Applicant) v. Westbury Howard Johnson Plaza Hotel (Respondent) (*Dismissed*)

0818-94-U: Bile Dore (Applicant) v. Thrifty Canada Limited (Respondent) v. United Food and Commercial Workers International Union, Local 175 (Intervener) (*Dismissed*)

0928-94-U: Labourers' International Union of North America, Local 506 (Applicant) v. Fairview Fittings & Manufacturing Limited (Respondent) (*Withdrawn*)

0941-94-U: Ontario Public Service Employees Union (Applicant) v. Nobleton Ambulance Association and Crown in Right of Ontario (Ministry of Health) (Respondents) (*Withdrawn*)

- 0957-94-U:** IWA-Canada, Local 1-2693 (Applicant) v. Goulard Lumber (1971) Limited, Mark Goulard and Romeo Goulard (Respondent) (*Withdrawn*)
- 0962-94-U:** International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Basile Interiors Ltd. (Respondent) (*Granted*)
- 0982-94-U:** Alda May Campbell (Applicant) v. Service Employees International Union Local 204 (Respondent) (*Dismissed*)
- 0991-94-U:** International Ladies Garment Workers Union (Applicant) v. BigiCanada Ltd. (Respondent) (*Terminated*)
- 1004-94-U:** Denis Baran (Applicant) v. U.F.C.W. Local 459 (Respondent) (*Dismissed*)
- 1041-94-U:** Grant Tadman (Applicant) v. Ontario English Catholic Teachers' Association Toronto Secondary Unit (Respondent) v. Metropolitan Separate School Board (Intervener) (*Dismissed*)
- 1048-94-U:** Labourers International Union of North America, Local 183 (Applicant) v. Adelaide Building Services Limited and/or Adelaide Maintenance Limited and/or The Adelaide Companies (Respondent) (*Withdrawn*)
- 1121-94-U:** Canadian Union of Public Employees and its Local 2563 (Applicant) v. Faywood Boulevard Child Care Program (Respondent) (*Withdrawn*)
- 1144-94-U:** United Steelworkers of America (Applicant) v. E.S.F. Ltd. c.o.b. as Tim Hortons Donuts (Respondent) (*Withdrawn*)
- 1154-94-U:** Faiz Bhuiyan (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)
- 1189-94-U:** Ameduadzi Wilson Lumor (Applicant) v. Graphic Communications International Union Specialty Division (Respondent) (*Dismissed*)
- 1205-94-U:** Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services (Respondent) (*Withdrawn*)
- 1225-94-U:** Construction Workers Local 53, CLAC (Applicant) v. Rauth Roofing Limited (Respondent) (*Withdrawn*)
- 1243-94-U:** United Food and Commercial Workers International Union, Local 175 and 633 (Applicant) v. Hanley Foods Inc. o/a Loeb Walker Place (Respondent) (*Withdrawn*)
- 1265-94-U:** Goulard Lumber (1971) Limited, Marc Goulard and Romeo Goulard (Applicants) v. IWA-Canada (Respondent) (*Withdrawn*)
- 1275-94-U:** Service Employees International Union (Applicant) v. Ian Martin Limited (Respondent) (*Withdrawn*)
- 1277-94-U:** Susan (Sue) Hamelin (Applicant) v. Service International Union, Local 204 (Respondents) (*Withdrawn*)
- 1315-94-U:** Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. Glamour Shots Canada (Respondent) (*Withdrawn*)
- 1320-94-U:** Peter David Green (Applicant) v. Teamsters Local Union 938 and Teamsters Joint Council 52 (Respondent) (*Withdrawn*)

1322-94-U: Practical Nurses Federation of Ontario (Applicant) v. 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence (Respondent) (*Withdrawn*)

1337-94-U: London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Central Park Lodges Ltd. - Victoria Place (Respondent) (*Terminated*)

1363-94-U: Harry Small (Applicant) v. Dover Floor Mills (Respondent) (*Withdrawn*)

1364-94-U: Harry Small (Applicant) v. UFCW (Respondent) (*Withdrawn*)

1411-94-U: Canadian Union of Public Employees (Applicant) v. Carleton University Students' Association Inc. (Respondent) (*Withdrawn*)

1413-94-U: IWA-Canada (Applicant) v. Cashway Building Centres Inc. (Respondent) (*Withdrawn*)

1422-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Albis Canada Inc. (Respondent) (*Withdrawn*)

1425-94-U: Steven Fields (Applicant) v. Grenon's Independent Grocer (Respondent) (*Withdrawn*)

1463-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent) (*Withdrawn*)

1477-94-U: Laundry & Linen Drivers and Industrial Workers Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Salvation Army (Respondent) (*Withdrawn*)

1479-94-U: Nelson Quarry Company and Communications, Energy and Paperworkers Union of Canada, Local Union No. 494 (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

1491-94-U: International Union of Operating Engineers, Local 793 (Applicant) v. Pine By Munro Inc. (Respondent) (*Withdrawn*)

1519-94-U: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Corporation of the Town of Huntsville (Respondent) (*Withdrawn*)

1542-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Siemens Electric Ltd. (Respondent) (*Withdrawn*)

1558-94-U: Graphic Communications International Union, Local 500M (Applicant) v. Eastend Bindery Limited (Respondent) (*Dismissed*)

1560-94-U: IWA Canada (Applicant) v. Kawartha Consumers Co-op Inc. (Respondent) (*Withdrawn*)

1568-94-U: Albert Antoine Plennevaux (Applicant) v. L.I.U.N.A. Local 1036 (Respondent) (*Dismissed*)

1579-94-U; 1597-94-U: Teamsters Local Union 938 (Applicant) v. 684804 Ontario Limited c.o.b. as City Taxi; Peel Taxi Limited, Intercab Incorporated; Mississauga Taxi Inc. and 7-11 Taxi (Respondent) (*Endorsed Settlement*)

1590-94-U: The Employees of the Brantford Branch Red Cross Homemakers (Applicant) v. S.E.I.U Local 204 (Respondent) (*Withdrawn*)

1592-94-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Applicant) v. Model Uniform (Respondent) (*Withdrawn*)

1629-94-U: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association Local 30 (Applicants) v. Midhurst Roofing Limited (Respondent) (*Endorsed Settlement*)

1662-94-U: United Steelworkers of America (Applicant) v. Marchelino Restaurants Ltd. c.o.b. as Movenpick (Respondent) (*Withdrawn*)

1684-94-U: Graphic Communications International Union, Local N-1 (Applicant) v. Print Key Inc. (Respondent) (*Withdrawn*)

1688-94-U: Filomena Correia (Applicant) v. Dominion Linen Supply Ltd. (Respondent) (*Dismissed*)

1758-94-U: Theodoros Traikos (Applicant) v. Bill Butler, Al Marshal, Bill Chapman, Neil Rothenberg, (Respondents) (*Dismissed*)

1785-94-U: Alfred Bruni (Applicant) v. Lajambe Forest Products and TheNational Life Assurance Company (Respondents) (*Dismissed*)

1863-94-U: Allan Robert Smith (Applicant) v. Co-Op Cab Co. and Local #1688 of United Steelworkers of America (Respondents) (*Dismissed*)

1900-94-U: Ilda Almeida (Applicant) v. Prime Poultry (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

3768-93-M: The Great Atlantic & Pacific Company of Canada, Limited (Applicant) v. United Food & Commercial Workers Union, Local 175 and 633, Shelly Fair Service, Scott Constable, Peggy Swift and Gary Dimock (Respondents) (*Dismissed*)

0936-94-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Advanced Transportation and Distribution Service (Respondent) (*Terminated*)

1406-94-M: Hotel Employees Restaurant Employees Union, Local 75 ['Local 75'] (Applicant) v. Westbury Howard Johnson Hotel ['the Westbury'], and Hotel Employees Restaurant Employees International Union ['the Parent Union'] (Respondents) (*Dismissed*)

1553-94-M: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ultrateck Electric Inc. (Respondent) (*Endorsed Settlement*)

1565-94-M: Service Employees Union Local 268, affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Brick Warehouse Corporation (Respondent) (*Dismissed*)

1602-94-M: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Granted*)

1663-94-M: United Steelworkers of America (Applicant) v. Marchelino Restaurants Ltd. c.o.b. as Movenpick (Respondent) (*Granted*)

1685-94-M: Graphic Communications International Union, Local N-1 (Applicant) v. Print Key Inc. (Respondent) (*Terminated*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

4274-93-M: Arnold A. Jacobs (Applicant) v. Ontario Public Service Employees Union, OPSEU (Respondent Trade Union) v. Management Board Secretariat M.B.S. (Respondent Employer) (*Withdrawn*)

1632-94-M: Michael David Langford (Applicant) v. C.A.W. Canada, (Respondent Trade Union) v. Pan-Oston Canada Ltd. (Respondent Employer) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1214-94-M: National Grocers Co. Ltd. and U.F.C.W., Local 1000A (Applicant) v. U.F.C.W., Local 1000A, Lou Brancalion, Greg Vandal, Daniel R. Marsh, Bernie Wyatt, Gary Johnson, Robert C. Smith, Richard Jakubczyk, Bill Pot, Glen Stead, V. E. Ramskogler, Al Harrison, Alan Westacott, Tom Cook, Alexander J. Helliker, Thayne Smith, Roman Buttigieg, John Reischer (Respondents) (*Granted*)

1633-94-M: Canadian Motor Hotel (Employer) v. Northern Ontario Joint Council of the Retail Wholesale and Department Store Union (Trade Union) (*Granted*)

TRUSTEESHIP

4398-93-T: International Association of Bridge, Structural and Ornamental Ironworkers, Local 834 (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers (Respondent) (*Terminated*)

JURISDICTIONAL DISPUTES

0091-94-JD: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Applicant) v. Delsan Demolition Limited, United Brotherhood of Carpenters and Joiners of America, Local 2041 (Respondents) v. Metropolitan Toronto Demolition Contractors Association Inc. (*Endorsed Settlement*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0096-94-M: International Association of Machinists and Aerospace Workers, Local Lodge 1542 (Applicant) v. (Arnprior Division of) Boeing Canada Technology (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0117-92-OH: Janice Lyn Tomkins (Applicant) v. Hamilton Street Railway Co. (H.S.R) - Dept. of Transportation for the Regional Municipality of Hamilton-Wentworth (Respondent) (*Dismissed*)

1815-93-OH: Manuel Gutierrez, Nelson Arias, and Jose Luis Picon (Applicant) v. Environmental Abatement Services Inc. (Respondent) (*Granted*)

3874-93-OH: Retail, Wholesale Department Store Union Local 461, Canadian Service Sector Division of the United Steelworkers of America, and Bill Harvey (Applicants) v. The Hostess Frito-Lay Company (Respondent) (*Withdrawn*)

0764-94-OH: William J. Viveen (Applicant) v. National Steel Car Limited (Respondent) (*Dismissed*)

0933-94-OH: Maria Raposo (Applicant) v. Hurley Corporation (Respondent) (*Granted*)

1562-94-OH: John C. Dahmer (Applicant) v. The Exolon-Esk Company of Canada, Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0068-91-G; 0122-91-G; 1381-91-G: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers'

International Association, Local 30 (Applicants) v. Sayers & Associates Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Intervener); Sheet Metal Workers' International Association, Local 392 (Applicant) v. H.R. Stark (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Intervener); Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 30 (Applicant) v. English & Mold Ltd. (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Intervener) (*Dismissed*)

1096-93-G: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 30 (Applicants) v. Sayers & Associates Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Intervener) (*Dismissed*)

1513-93-G: Labourers' International Union of North America, Labourers' International Union of North America, Local 1059 (Applicant) v. Banister Pipeline and Pipe Line Contractors Association of Canada (Respondents) (*Granted*)

1935-93-G; 3346-93-G: Labourers' International Union of North America - Local 247 (Applicant) v. Eastern Concrete Drilling (Respondent); Labourers' International Union of North America, Local 247 (Applicant) v. Eastern Concrete Drilling and Sawcutting Ltd. and Eastern Concrete Drilling, A division of 862851 Ontario Limited (Respondents) (*Withdrawn*)

3419-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. C.G. Plumbing and Heating Ltd. (Respondent) (*Withdrawn*)

4017-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Delsan Demolition Limited, Francesco Santaguida, Luigi Santaguida and Domenic Santaguida (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Intervener) (*Withdrawn*)

4383-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and Ontario Provincial Conference of the IUBAC (Applicant) v. M. S. Contracting Ltd. (Respondent) (*Endorsed Settlement*)

0009-94-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 20 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. N.R.J.M. General Contractors Limited, 1000148 Ontario Inc. (Respondents) (*Withdrawn*)

0368-94-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 20 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Varamae Construction Company Limited (Respondent) (*Withdrawn*)

0480-94-G: Ontario Pipe Trades Council (Applicant) v. Airdrie Mechanical and Sheet Metal Limited (Respondent) (*Terminated*)

0481-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. E & R Carpentry Inc. (Respondent) (*Endorsed Settlement*)

0520-94-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America, (Applicant) v. J.A. MacDonald (London) Limited and Ontario Panelization Ltd. (Respondents) (*Endorsed Settlement*)

0696-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Skyline Carpentry Ltd. (Respondent) (*Endorsed Settlement*)

0846-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Locals 721 and 736 (Applicant) v. Abel Metal Limited, Vision Almet Limited (Respondents) (*Withdrawn*)

0914-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Skyline Carpentry Ltd. (Respondent) (*Endorsed Settlement*)

0915-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Quintas Masonry (Respondent) (*Withdrawn*)

0942-94-G; 0933-93-G; 2649-93-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Tara Heating & Air Conditioning Ltd. (Respondent) (*Granted*)

1007-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mario Skara Construction (Respondent) (*Withdrawn*)

1008-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gladstone Construction (Respondent) (*Withdrawn*)

1015-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Kustom Insulation Ltd. (Respondent) (*Endorsed Settlement*)

1031-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Mar-Lan Construction Ltd. (Respondent) (*Withdrawn*)

1072-94-G; 1073-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Environmental Systems Corporation, Solomon Energy Systems Limited (Respondents) (*Withdrawn*)

1075-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Philip Doyle Mechanical Inc. (Respondent) (*Endorsed Settlement*)

1107-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Rovico Architectural Products Ltd. (Respondent) (*Granted*)

1182-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Locals 700 and 721 (Applicant) v. Mac Reinforcing Ltd. and 860716 Ontario Limited (Respondents) (*Granted*)

1206-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. 860200 Ontario Inc. c.o.b. BES-RE-BAR (Respondent) (*Endorsed Settlement*)

1229-94-G; 1230-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Pagani Drywall (1991) Ltd. (Respondent) (*Endorsed Settlement*)

1235-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. E.S. Fox Limited (Respondent) (*Endorsed Settlement*)

1281-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Resar Construction Inc. (Respondent) (*Endorsed Settlement*)

1303-94-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Lariano Acoustics Inc. (Respondent) (*Endorsed Settlement*)

1332-94-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

1347-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. An-Dell Electric (Respondent) (*Withdrawn*)

1348-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canber Electric Inc. (Respondent) (*Withdrawn*)

1349-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Proteus Electric Ltd. (Respondent) (*Endorsed Settlement*)

1350-94-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Triple A Electric Limited (Respondent) (*Withdrawn*)

1351-94-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Lynx Cabling Systems Limited (Respondent) (*Withdrawn*)

1354-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ko-Rek Repairs Reg'd (Respondent) (*Endorsed Settlement*)

1355-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambarari Construction Inc. (Respondent) (*Endorsed Settlement*)

1359-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Martek Drywall & Acoustic (Respondent) (*Endorsed Settlement*)

1372-94-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Cem-Al Erectors Ltd. (Respondent) (*Withdrawn*)

1375-94-G: Sheet Metal Workers International Association, Local 537 (Applicant) v. Cem-Al Erectors Ltd. (Respondent) (*Withdrawn*)

1383-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Victory Plumbing Inc. (Respondent) (*Endorsed Settlement*)

1387-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Bondfield Construction Company (1988) Ltd. (Respondent) (*Withdrawn*)

1391-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Generation Carpentry Contracting Ltd. (Respondent) (*Withdrawn*)

1393-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Crossline Masonry Contracting Inc. (Respondent) (*Withdrawn*)

1395-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. M. Gasparetto Construction Limited (Respondent) (*Withdrawn*)

1396-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Zebio Masonry Ltd. (Respondent) (*Withdrawn*)

1397-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Dante Masonry Ltd. (Respondent) (*Withdrawn*)

1398-94-G; 1399-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Skyline Construction Masonry Limited (Respondent) (*Withdrawn*)

1400-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Eurowall Masonry Ltd. (Respondent) (*Withdrawn*)

1412-94-G: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Jim McGrath Painting & Decorating Limited (Respondent) (*Endorsed Settlement*)

1416-94-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. L.A. General Contracting (Respondent) (*Endorsed Settlement*)

1417-94-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. National Dry-wall Ltd. (Respondent) (*Withdrawn*)

1435-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Onsite Excavating (Respondent) (*Withdrawn*)

1439-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Nation Drywall Limited (Respondent) (*Endorsed Settlement*)

1446-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Three Star Masonry Ltd. (Respondent) (*Withdrawn*)

1450-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dimarco Plumbing & Heating Co. Ltd. (Respondent) (*Endorsed Settlement*)

1459-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Concrete Forming (Respondent) (*Endorsed Settlement*)

1460-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Ontario Masonry Co. Ltd. (Respondent) (*Withdrawn*)

1471-94-G; 1472-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barbarian Construction Limited c.o.b. as Wood Systems (Respondent) (*Granted*)

1473-94-G; 1474-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Retaylor's Interior Inc. and Retaylor's Interiors, a division of 963554 Ontario Inc. (Respondent) (*Granted*)

1490-94-G: International Union of Operating Engineers and Its Local 793 (Applicant) v. C. Villeneuve Construction Co. Ltd. (Respondent) (*Dismissed*)

1499-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Formanti Structures Ltd. (Respondent) (*Withdrawn*)

1501-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Murphy Construction (Respondent) (*Withdrawn*)

1520-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Skyline Structural Forming Limited (Respondent) (*Withdrawn*)

1521-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1005060 Ontario Incorporated c.o.b. Silvercreek Formwork (Respondent) (*Withdrawn*)

1534-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Sibb Architectural Inc. (Respondent) (*Endorsed Settlement*)

1586-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. New Lomar General Contractor Limited (Respondent) (*Withdrawn*)

1587-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Paving Ltd. (Respondent) (*Endorsed Settlement*)

1595-94-G: Construction Workers Local 53, CLAC (Applicant) v. Poirier Electric Limited (Respondent) (*Withdrawn*)

1600-94-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Belmont Drywall & Acoustics Ltd. (Respondent) (*Endorsed Settlement*)

1608-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gladstone Construction (Respondent) (*Withdrawn*)

1609-94-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Favot Contracting Ltd. (Respondent) (*Withdrawn*)

1610-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Osler Paving Ltd. (Respondent) (*Endorsed Settlement*)

1651-94-G: Labourers' International Union of North America, Local 597 (Applicant) v. J.J. McGuire General Contracting (Respondent) (*Endorsed Settlement*)

1679-94-G: International Union of Elevator Constructors Local No. 90 (Applicant) v. Dover Corporation (Canada) Limited, National Elevator & Escalator Association (Respondents) (*Withdrawn*)

1692-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Towne Concrete Forming Ltd. (Respondent) (*Endorsed Settlement*)

1696-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Field Mechanical Inc., The Metropolitan Plumbing and Heating Contractors Association Toronto (Respondents) (*Endorsed Settlement*)

1697-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Uniton Mechanical Contractors Limited (Respondent) (*Withdrawn*)

1735-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Sunrise Electric Ltd. (Respondent) (*Endorsed Settlement*)

1737-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canber Electric Inc. (Respondent) (*Withdrawn*)

1739-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Cairns Utility Pole Line Construction (Respondent) (*Withdrawn*)

1741-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. An-Dell Electric (Respondent) (*Withdrawn*)

1744-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Endorsed Settlement*)

1749-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. New Generation Drywall Partnership, New Generation Inc. and Marin Contracting Limited (Respondents) (*Endorsed Settlement*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDAA

1615-93-M: Practical Nurses Federation of Ontario (Applicant) v. Select Living (1991)Ltd. (Respondent) (*Granted*)

1678-93-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Branch 133 Legion Village Inc. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3579-92-R: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a division of Royplast Limited (Respondent) v. Samuel Ofosu Ansah (Intervener) (*Denied*)

0517-93-M: The Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Hamilton (Respondent) (*Dismissed*)

0974-93-U: Covington Clarke (Applicant) v. Local 400 F.W.D. - International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO/, La-Z-Boy Canada Limited (Respondents) (*Denied*)

2680-93-U: Eva Aceti (Applicant) v. Office and Professional Employees International Union Local 343 (Respondent) (*Dismissed*)

3315-93-U: Daniel Adusei and Felicia Adusei (Applicant) v. Ontario Nurses' Association (Respondent) v. Clarke Institute of Psychiatry (Intervener) (*Dismissed*)

0100-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Milvan Iron Works Ltd. (Respondent) (*Withdrawn*)

0215-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dimarco Plumbing & Heating Co. Ltd. (Respondent) (*Granted*)

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